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The legislature of Minnesota recently undertook by statute to regulate the manufacture and sale of baking powder. It enacted a statute which requires all manufacturers and sellers of compounds or mixtures intended for use as baking powders, to affix a label to every box or can, containing the name and residence of the manufacturer and the words, "This baking powder is composed of the following ingredients and none other." The names of the ingredients were to follow. The question as to the validity of the statute has recently been before the Supreme Court of Minnesota in State v. Sherod. Its opponents advanced the argument that, if the baking powders are pure cream of tarter powders, there is no reason requiring their ingredients to be published, and it is an unwarranted interference with a manufacturer's or dealer's business to put him to that expense and annoyance. Further, that the public will receive no benefit from such labels; that purchasers of such powders do not know the meaning of the terms used; that it is unjust to cause a manufacturer or dealer in pure powders to submit to such a law, for the purpose of exposing those who make or deal in a harmful article; that if such a law can be enforced against baking powders, without reference to their purity, then pure sugar, pure flour and other pure staple articles of food may be likewise brought under similar restrictions, and to single out baking powder in this manner is class legislation and void.

The court, however, thought there was nothing new in all these objections and upheld the statute upon the ground that the subject and its regulation was within the police power of the State.

The authorities as to whether or not unearned wages may be assigned so as to be recoverable in an action at law in a jurisdiction where the distinction between law and equity prevails are conflicting. This question has been given recent prominence by a decision of a Chicago court, Silverstein v. Gresheimer, in which it was held that wages yet to become due were not transferable.

At common law a chose in action, except negotiable instruments, was not assignable, unless the debtor assented to the assignment and promised to pay the assignee, in which case an action might be maintained by the assignee on the express promise of the debtor to pay. 2 Black Com., 442; 2 Chitty on Contracts, 1357 (11th Am. Ed.); McKenney v. Alvis, 14 Ill. 33; Olds v. Cummings, 31 Ill. 188. This rule of law has in these modern times, conforming to changed conditions, been much modified, so that the common law rule in its entirety now no longer prevails.

The general test to be applied in determining the assignability of a chose in action is whether or not it would survive and pass to the personal representatives of a decedent assignor if no assignment had been made. If it would so survive, it may be assigned so as to pass the interest assigned to the assignee; if it does not so survive, it is not assignable either at law or in equity.

The Chicago court followed the doctrine enunciated in the case of Lightbody v. Smith, 125 Mass. 51, that except as to wages actually due at the time of an assignment, such an assignment is an attempt to transfer a mere possibility of future earnings, and therefore as to such future earnings is not an existing chose in action.

Justice Cooley, in Kane v. Cough, 36 Mich. 436, held to the doctrine announced in Lightbody v. Smith, and inferentially decided, that where an action could not be maintained on an assignment of demands having no actual existence at the time of the assignment, resort might be had to equity after the demands intended were subsequently brought into existence.

NOTES OF IMPORTANT DECISIONS.

STATUTE OF FRAUDS—BARTER AND EXCHANGE—PART PAYMENT OF PRICE.—In Raywood v. Colton, 104 Fed. Rep. 219, decided by the United States Circuit Court of Appeals, Second Circuit it appeared that plaintiff and defendant were the owners of all but five of the 2,500 shares of a joint-stock mercantile company, of which plaintiff was vice-president and general manager and a director, while his father was also a director, and his

brother the manager of the company's business in Japan. Plaintiff owned one-fourth of the stock, which was pledged to defendant to secure an indebtedness, defendant being the owner of the remainder of the stock. The parties made an oral agreement that plaintiff should "get out" of the business, and he and his relatives should resign their positions, in consideration of which he should receive one-fourth of the goods owned by the company, after deducting the amount of his indebtedness to defendant. After this agreement there was talk of a different arrangement, and several days passed when plaintiff delivered to defendant the resignation of himself and brother, stating that it was in fulfillment of the agreement. These were accepted by defendant, and plaintiff subsequently brought suit to compel delivery of the goods. It was held (Shipman, J., dissenting) that, in legal effect, the contract was one for the exchange of plaintiff's shares of stock for the goods, and that, regarding plaintiff as a buyer and the resignations as a part of the consideration to be paid, there was no such restatement or reaffirmance of the contract at the time of their delivery as to render the payment one made "at the time," which would validate the contract under the New York statute of frauds; defendant regarded also as a buyer of plaintiff's shares, having neither received any part of the goods nor paid any part of the price.

ELEVATORS—INJURY TO PASSENGERS—NEGLIGENCE — LIABILITY OF UNITED STATES FOR TORTS.—Two recent cases involve liability for injuries by elevators. In Bigby v. United States, 103 Fed. Rep. 597, decided in the United States Circuit Court, Eastern Division New York, it was held that while the license extended by the United States to the public to use its passenger elevator in a post office building imposes upon the government the duty to use ordinary care to see that the facilities offered to its licensees are in a condition of reasonable safety, no implied contract arises from such relation to carry the passenger to his destination which will entitle one who is injured, through the incompetence of a person in charge of the elevator to maintain an action against the United States for damages under act March 3, 1887 (24 Stat. 505), permitting a recovery against the United States for claims founded upon any contract, express or implied, with the government of the United States or for damages, in cases not sounding in tort.

In Gibson v. International Trust Co., 58 N. E. Rep. 278, decided by the Supreme Judicial Court of Massachusetts, it was held that there is no negligence on the part of the elevator boy, where, having stopped the elevator, he attempted to sit down on his stool, without looking back, not knowing it had been moved, and, losing his balance, clutched for something to support him, taking hold of the lever, and thus starting the elevator, whereby a passenger was injured; that the janitor of a building, who, while riding in the elevator, moves the elevator boy's stool without the latter's knowledge, does not act as the servant or agent of the owner of the building in so doing, so as to make it liable for his negligence therein to a passenger injured by the starting of the elevator, by the boy taking hold of the lever when clutching for something to support him, as he lost his balance while attempting to sit down, and that even if the duty owed by the owner of a building to a passenger on its elevator be that of a common carrier, so that an accident to him makes a *prima facie* case, the court must take the case from the jury when, on all the evidence, no negligence appears.

The question whether a person or corporation running an elevator is a public carrier, or has the responsibilities of one, is one upon which there is a conflict of authorities. See, in favor of the proposition, Mitchell v. Marker, 10 C. C. A. 306, 62 Fed. Rep. 139; Treadwell v. Whittier, 80 Cal. 574, 22 Pac. Rep. 266, 5 L. R. A. 498; Hotel Co. v. Camp, 97 Ky. 424, 30 S. W. Rep. 1010; Goodsell v. Taylor, 41 Minn. 207, 42 N. W. Rep. 873, 4 L. R. A. 673. In other States, such cases are tried upon the issues of due care on the part of the plaintiff, and negligence on the part of the defendant. Lee v. Knapp, 55 Mo. App. 390; McGrell v. Building Co., 153 N. Y. 265, 47 N. E. Rep. 305. In the last case it was held that the case should have been taken from the jury because there was no evidence of the defendant's negligence. In Massachusetts while the question has not been discussed, Shattuck v. Rand, 142 Mass. 83, 7 N. E. Rep. 43, was tried and decided on the issues applicable to ordinary cases of negligence.

CRIMINAL LAW — HOMICIDE — VENUE OF CRIME.—The principal point decided by the Supreme Court of Florida in Robertson v. State was that an indictment that alleges the infliction of mortal wounds in a county of that State, and that the party wounded died of such wounds within a year and a day of their infliction, but does not state in what county and State the death occurred, is sufficient under the laws of that State. The opinion of the court is noteworthy for the reason that the personal view of the judge who wrote it seems to be adverse to that of the majority. The court says:

"At the common law, in cases of homicide, the place of the death had to be alleged in the indictment, and this was in the county where the trial was had and the investigation of the crime took place. It was said this was necessary to show jurisdiction in the court in that county. It was also a principle of common-law pleading that the essential ingredients of the offense, embracing with reasonable certainty the particulars of time and place, should be stated in the indictment, in order to enable the accused to prepare for his defense and protect himself after judgment against a subsequent prosecution. When a mortal wound was inflicted in one county, and death ensued in another, doubts arose as to

whether there could be any prosecution in either county, and to remove such doubts a statute was passed during the reign of Edward VI. providing that prosecution might be had in the county where death took place. In the preamble to this statute the uncertainty on the subject was recited, and also the reason for it. Anciently jurors were the witnesses in the case, and had to come from the particular locality of the crime; and hence the necessity of alleging venue, not only of the county, but of the vicinage or particular locality of the offense. When a mortal blow was struck in one county, and death resulted in another, a jury of the county where the blow was struck could inquire of that fact; but it was supposed that they could not consider the matter of death, which occurred in the other county. The old authorities speak of having the dead body carried back where the blows were struck, in order to avoid the difficulty and of permitting an inquest upon the body. When jurors ceased to be selected because they were witnesses of the occurrence in the case, and based their conclusions upon sworn testimony, it would seem that the difficulties in the way of trying in the county where the fatal blow was struck had disappeared. It appears, however, on account of the doubts expressed, the statute was passed, and at a subsequent period a further enactment was made providing for cases where a mortal wound was inflicted in England and death resulted beyond, and *vice versa*. The true view, probably, is that at common law the offense was committed where the mortal wound was inflicted, and the crime was complete there, so far as the defendant was concerned. Death must result within a year and a day from the wound, in order to constitute murder; but, when it does result within that time, it relates back to the fatal beginning, as a direct sequence of it. U. S. v. Guiteau, 1 Mackey, 498; State v. Gessert, 21 Minn. 369; Riley v. State, 9 Humph. 646; State v. Kelly, 76 Me. 331, 49 Am. Rep. 620; Green v. State, 66 Ala. 40, 41 Am. Rep. 744; Stout v. State, 76 Md. 317, 25 Atl. Rep. 299; *Ex parte* McNeeley, 36 W. Va. 84, 14 S. E. Rep. 436, 15 L. R. A. 226, 32 Am. St. Rep. 831. Our constitution ordains that the accused shall have a right to a trial in the county where the crime was committed, and the language of our statute is that 'all criminal causes shall be tried in the county where the offense was committed, except when otherwise provided by law.' Section 2358, Rev. St. There are other provisions on the subject of local jurisdictions of offenses, and among them are the following: Section 2360: 'When the commission of an offense commenced here is consummated without the boundaries of the State, the offender shall be liable to punishment here therefor, and the jurisdiction in such cases shall be in the county in which the offense was commenced.' Section 2364: 'In all cases where an indictable offense shall be perpetrated in this State, and the same shall commence in any one county and terminate in another, the offender shall be liable to indictment in either county.' So far as showing jurisdiction in the court is concerned, it is evident, under the statutes mentioned, that an allegation of a mortal wound in a county in this State, and the consequent death therefrom within a year and a day, would be sufficient to give jurisdiction in the county where the mortal blow was struck. If the mortal wound is inflicted in a county in this State, jurisdiction attaches there, whether the death result in another county of the State, or beyond its territorial limits. The question here, however, is not one entirely of jurisdiction, but one, also, of pleading, and a direct assault was made on the indictment by motion to quash on account of the failure to allege where the death occurred. The American decisions are in conflict on the point, an apparent majority in number sustaining an indictment without an allegation as to the place of death. State v. Bowen, 16 Kan. 475; Roach v. State, 34 Ga. 78; State v. Baldwin, 15 Wash. 15, 45 Pac. Rep. 650; State v. Jones, 38 La. Ann. 792, overruling State v. Cummings, 5 La. Ann. 330. Our statute further provides that 'the common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this State where there is no existing provision by statute on the subject' Section 2369., Rev. St. We have two sections on what an indictment shall contain, as follows: Section 2892: 'Every indictment shall be deemed and adjudged good which charges the crime substantially in the language of the statute prohibiting the crime or prescribing the punishment, if any such there be, or if at common law, so plainly that the nature of the offense charged may be easily understood by the jury.' Section 2893: 'No indictment shall be quashed or judgment be arrested or new trial granted on account of any defect in the form of the indictment, or of misjoinder of offenses, or for any cause whatsoever, unless the court shall be of the opinion that the indictment is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense.' These statutory provisions have not been regarded as dispensing with matters of substance as required by the common-law mode of pleading. The averment of death is material to constitute the crime of murder or manslaughter, and, according to the principle of pleading already stated, every material averment in an indictment should be stated with time and place. The time should be stated, to show that death ensued within the year and day, and place to enable the accused to show, if he can, that it did not occur, and also to protect himself against further prosecution in the county where death occurs, which is authorized by statute. If the death occurred in the county where the mortal blows were inflicted, the common-law indictment

so alleged it; and, if it occurred in a different county, that fact was also stated, and the accused fully advised of where it was alleged to have taken place. In reference to indictments under statutes, it is stated by Chitty (1 Cr. Law, 195): 'It may, in general, be observed that in indictments founded upon the statutes we have already enumerated, which authorize a mode or place of trial that did not exist at common law, all facts within the realm should be laid in the county where they actually happened. Thus, in case of murder, if the stroke or poison be given in one county, and death occur in another, the facts should be stated according to their actual existence.' The point was directly passed on by the Supreme Court of the United States, in the case of Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. Rep. 761, 35 L. Ed. 377, and it was there held that an indictment for murder that failed to aver the place of the death was fatally defective. The same conclusion was reached in State v. Coleman, 17 S. Car. 473. See, also, Kerr, Hom. § 268. The following decisions also bear on the question: People v. Dougherty, 7 Cal. 395; Chapman v. People, 39 Mich. 357; Riggs v. State, 26 Miss. 51; State v. Dunkley, 3 Ired. 116; State v. McCoy, 8 Rob. (La.) 545, 41 Am. Dec. 301. See, also, Conner v. State, 29 Fla. 455, text 485, 10 South. Rep. 891. I think the view adopted by the Supreme Court of the United States, being in harmony with the rule of the common law, is the correct one, and should be followed. It will be seen that, under section 2364, Rev. St., where an indictable offense shall commence in any one county and terminate in another, the offender shall be liable to indictment in either county. In case mortal blows should be inflicted in one county, and death ensue in another, and the indictment should be found in the one where deathoccurred, should not there be allegation of the County where the blows were struck, as well where the death occurred? Without expressing an opinion as to the right of the State, under our constitution, to indict as in the case supposed, it is sufficient to say that the act of the legislature in terms authorizes it; and it appears to me that the best course is to require the indictment, as was the rule of the common law, to state, not only the county where the mortal blows were inflicted, but also the county or place where death ensued. The majority of the court think that an indictment alleging mortal blows in the county where the prosecution is instituted need not state any county or place where death occurred, and, as there are no other questions raised in this case than as above considered, the judgment must be affirmed."

CONSTRUCTION OF LAWS OF NEW YORK REQUIRING LIFE INSURANCE COMPANIES DOING BUSINESS IN THAT STATE TO MAIL NOTICE INFORMING PERSONS WHOSE LIVES ARE INSURED OF THE DATE, AMONG OTHER THINGS, OF MATURITY OF PREMIUMS.

Since 1876 New York has had a statute requiring life insurance companies doing business in that State to mail to the persons insured notice of the date of maturity of premiums, and requiring many other particulars to be stated in the notice. In 1877 the law was amended to read as follows.[1]

In 1892 the law was again amended to read as follows.[2]

[1] Sec. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice: Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for. Sec. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given. Laws 1877, ch. 321.

[2] No life insurance corporation doing business in this State shall declare forfeited or lapsed any policy hereinafter issued or renewed, and not issued upon

In 1897 the law was again amended and is practically the same as the law of 1892, with the insertion of phrases giving the statute effect for but one year after non-payment of a premium, and adding a limitation clause as follows: "No action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued."

These statutes have cost life insurance much for expenses of litigation, and in some instances large amounts have been recovered against the companies by the interposition of the statute to avoid a forfeiture.

It is believed that the following are all the decisions reported construing the several acts; and a sincere effort has been made to lucidly present the various constructions of the statutes.

The law of 1877 amends that of 1876 in some unimportant particulars. The law as it now stands was enacted in 1897 and is practically the same as the law of 1892, with the insertion of phrases giving the statute effect for but one year after non-payment of a premium and adding a limitation clause as follows: "No action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which the default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued."

1. As to Applicability of Statute to Notes Given for Premiums.—Where the notice required had been duly given before an annual premium became due, for which insured gave a note, no other notice is necessary in order that the company may enforce a forfeiture for non-payment of the note.[3]

2. As to Burden of Proof where Statute Applies.—The burden of proof is on the insurance company to show that it gave the notice in the terms required by the statute.[4]

3. As to Class of Companies Affected.—A mutual benefit association, requiring the payment of assessments on stated dates, must give the notice required by the statute in order to forfeit a policy for non-payment of premium.[5] The statute is not applicable to fraternal orders.[6] The statute is not applicable to an association conducting the business of assessment, life and accident insurance.[7] Though a notice complying with the statute is given by a mutual benefit association, requiring payment of mortuary assessments in small sums, which may be made at any time, the association can take no advantage of the fact of serving the notice as a defense to an action on one of its policies, since the act is not applicable to such assessments either in its letter or spirit.[8]

4. As to Date of Mailing Notice Affecting its Validity.—In computing the time for giving

the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest, or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment or portion thereof due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation or by an officer thereof or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, or installment or portion thereof then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium, by or before the date it falls due, the policy and all payments thereon will become forfeited and void except as the right to a surrender value or paid up policy, as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment, and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Laws 1892, ch. 690, § 92.

[3] Conway v. Phœnix Mut. Life Ins. Co., 140 N. Y. 79; Banholzer v. New York Life Ins. Co., 74 Minn. 387.

[4] Carter v. Brooklyn Life Ins. Co., 110 N. Y. 157; Baxter v. Brooklyn Life Ins. Co., 119 N. Y. 450; Fischer v. Metropolitan Life Ins. Co., 37 App. Div. 575, 56 N. Y. Supp. 260; Mullen v. Mut. Life Ins. Co., 89 Tex. 259.

[5] Schad v. Security Mut. Life Assn., 11 App. Div. 487, 42 N. Y. Supp. 314; Elmer v. Mut. Ben. Life Assn., 19 N. Y. Supp. 289.

[6] Bopple v. Supreme Tent, etc., 18 App. Div. 488, 45 N. Y. Supp. 1096.

[7] Greenwald v. United Life Ins. Co., 18 Misc. Rep 91, 42 N. Y. Supp. 973.

[8] Merriman v. Keystone Mut. Ben. Assn., 138 N. Y. 116.

the notice the day on which the premium falls due, and the day on which notice was mailed, are to be excluded.[9] A notice given in compliance with laws 1897, more than fifteen days and less than forty-five days prior to the date when the premium was to become due, and in all other respects sufficient, effects a forfeiture if the premium be not paid upon the date due; and a contention that under the act of 1897 the policy holder is given one year's grace after default in the payment of the premium, so that a premium due upon a certain day could be paid at any time within a year from that day can have no weight; nor a further contention that the notice must be sent, not before the due date of the premium, but after the year of grace (so contended for) has commenced to run, and prior to the expiration of the year of grace, as the statute is not susceptible of any such construction, the year of grace provided for in the act of 1897 applying only where the company has failed to send a notice at all.[10]

5. *As to Constitutional Law.*—The statute is not so far a part of the policy, or contract, that an amendment of the law, or its repeal, can be said to be an impairment of the obligation of the contract, in violation of the United States constitutional inhibition.[11] Where a State court holds, basing its decision on that of the highest court of New York, that the law of New York, requiring notice of premiums due on life insurance policies, has no application to notes given for premium, it does not give jurisdiction thereby to the United States Supreme Court for failure to give full faith and credit to the United States.[12]

6. *As to Effect in States Other than New York.*—The language of the statute extends to all business done by New York companies.[13]

Interstate comity being the basis upon which insurance companies organized in one State do business in another, the courts of the States, other than where such companies are organized, will not permit them to forfeit a policy of insurance in a manner prohibited by the laws of the State of their creation to the prejudice of one of their citizens, as no consideration of State comity requires it.[14]

The statute is applicable only to business done in the State of New York, and the question as to whether or not the companies doing such business were organized under its laws or those of some other State has no influence upon the question as to whether or not the statute is applicable; but the actual issuance of the policy in New York makes the business of the State of New York, though the policy is delivered in another State and takes effect there.[15] Life policies which are New York contracts are dominated by the statutes respecting forfeitures as completely as though the statutory conditions had been explicitly incorporated in them.[16]

7. *As to Effect of Change in or Repeal of Statute.*—These statutes are not so far a part of the contract that an amendment of the law or its repeal can be said to be an impairment of the obligation of the contract, in violation of the constitutional inhibition.[17]

A term policy, issued prior to act of 1892, while act of 1877 was in force, is governed by the act of 1892; and though there was no exemption of term policies from the act of 1877, the act of 1892 exempting them relieves the companies from giving notice on term policies issued while act of 1877 was in force, and relieves them from the effect of an insufficient notice given under the act of 1877.[18]

[9] Hicks v. National Life Ins. Co., 60 Fed. Rep. 690, 9 C. C. A. 215; Rosenplanter v. Provident Sav. Life Assur. Soc., 96 Fed. Rep. 721, 37 C. C. A. 566.

[10] Schnell v. Mut. Life Ins. Co., 65 N. Y. Sup p. 889 App. Div.

[11] Rosenblanter v. Provident Sav. Life Assur. Soc., 96 Fed. Rep. 721, 37 C. C. A. 566.

[12] Banholzer v. New York Life Ins. Co., 178 U. S. 20 Sup. Ct. Rep. 972.

[13] Mut. Life Ins. Co. v. Dingley, 100 Fed. Rep. 408.

[14] Equitable Life Assur. Soc. v. Frommhold, 75 Ill. App. 43.

[15] Griesemer v. Mut. Life Ins. Co., 10 Wash. 202, 38 Pac. Rep. 1031.

[16] Hicks v. National Life Ins. Co., 60 Fed. Rep. 690, 9 C. C. A. 215; Phinney v. Mut. Life Ins. Co., 67 Fed. Rep. 493; Equitable Life Assur. Soc. v. Nixon, 81 Fed. Rep. 796, 26 C. C. A. 620; Equitable Life Assur. Soc. v. Trimble, 83 Fed. Rep. 85, 27 C. C. A. 404; Hathaway v. Mut. Life Ins. Co., 99 Fed. Rep. 534; Mut. Life Ins. Co. v. Dingley, 100 Fed. Rep. 408; Germania Life Ins. Co. v. Feetz (Tex. Civ. App.), 47 S. W. Rep. 687; Equitable Life Assur. Soc. v. Frommhold, 75 Ill. App. 43; Griffith v. New York Life Ins. Co., 101 Cal. 627, 36 Pac. Rep. 113; Osborne v. Home Life Ins. Co. (Cal.), 56 Pac. Rep. 616; Harrington v. Home Life Ins. Co. (Cal.), 58 Pac. Rep. 180; Mullen v. Mut. Life Ins. Co., 89 Tex. 259, 34 S. W. Rep. 605.

[17] Rosenplanter v. Provident Sav. Life Assur. Soc., 96 Fed. Rep. 721, 37 C. C. A. 566.

[18] Rosenplanter v. Provident Sav. Life Assur. Soc., 96 Fed. Rep. 721, 37 C. C. A. 566.

A policy which was kept alive or in force by failure to give the notice required by act 1892 from that year till the passage of the act of 1897, is not affected by the provisions in the latter act (1897) that a policy will be kept in force thereby for one year after default in the payment of premiums, and limiting action on such policy to one year after such default; and such policy is valid and enforceable, the insured's death occurring and the action being commenced after the passage of the act of 1897.[19]

8. *As to Effect of Mere Mailing of Notice on Rights of Parties.*—The duty of the company is fully complied with and the forfeiture imposed by the terms of the policy may legally follow, if the required notice is duly mailed; its failure to reach the insured being a risk which the statute intends he shall assume.[20] When a defendant insurance company has, on the trial of a case in which the statute has application, offered evidence of mailing the notice required, rebutting evidence on the part of the plaintiff is admissible to show that it was not received.[21] Testimony that the notice was mailed, the witness stating what he did, but did not include in the enumeration of what he did the payment of the postage, is inadmissible and properly excluded.[22]

9. *As to Evidence Where Statute Applies.*—The affidavit permitted by the statute as *prima facie* evidence of the mailing of the notice can be read only when proof shall have been given that the person making it was an authorized person prescribed by the statute, and, until that proof has been given in the case, the affidavit is not competent evidence.[23]

10. *As to Excuses Offered by Companies for Failure to Give Notice.*—That insured said, when requested to pay the premium due upon the policy, that he did not intend to keep the policy in force, does not waive compliance with the statute by sending the notice required, nor estop the beneficiaries of the policy to claim the benefit of the notice required by the statute.[24]

The statute does not apply where insured, after default in payment of premiums, accepts a certificate entitling him to paid-up insurance for a limited period, though under laws N. Y., 1879, ch. 347, sec. 1, the policy would have remained in force for a similar length of time if it had been declared forfeited after giving a legal notice required by laws 1877.[25]

The statute of limitations is a good excuse for failure to give the notice required, and, under a statute barring actions on instruments in writing executed out of the State after two years, the failure to bring action for three years after the death of insured prevents recovery.[26]

Where the insured, under a policy payable to his executors, administrators or assigns, knowing when the second annual premium fell due, and was informed of his default in the matter of payment, and both he and the company agreed to the ending of the contract, such facts show a sufficient excuse for not giving the notice required.[27]

Where the insured, under a policy payable to his wife, if living at the time of his death, and, if not, to their children, failed, neglected and refused to pay the premium thereon, as did also the wife and children, no recovery can be had on the policy, since such facts show a sufficient excuse for not giving the notice required.[28]

Where insured stated to an agent of the company that he could not pay the premium due on a certain date on a policy payable to his executors, administrators or assigns, and he did not pay or tender the same, but thereafter surrendered the policy to the agent, they mutually understanding that the policy was of no force then or thereafter by reason

[19] Hathaway v. Mut. Life Ins. Co., 99 Fed. Rep. 534.

[20] McConnell v. Provident Sav. Life Assur. Soc., 92 Fed. Rep. 769, 34 C. C. A. 663; New York Life Ins. Co. v. Scott (Tex. C. C. A.), 57 S. W. Rep. 677.

[21] Equitable Life Assur. Soc. v. Nixon, 81 Fed. Rep. 796, 26 C. C. A. 620.

[22] Provident Sav. Life Assur. Soc. v. Nixon, 73 Fed. Rep. 144, 19 C. C. A. 414.

[23] Fischer v. Metropolitan Life Ins. Co., 56 N. Y. Supp. 260, 37 App. Div. 575.

[24] Equitable Life Assur. Soc. v. Nixon, 81 Fed. Rep. 796, 26 C. C. A. 620; Mut. Life Ins. Co. v. Allen, Cohan, Sears, 97 Fed. Rep. 985, 986; Mut. Life Ins. Co. v. Hill, 97 Fed. Rep. 263; Mut. Life Ins. Co. v. Dingley, 100 Fed. Rep. 408.

[25] Johnson v. New York Life Ins. Co. (Iowa), 78 N. W. Rep. 905.

[26] Harrington (Harrigan) v. Home Life Ins. Co. (Cal.), 58 Pac. Rep. 180; Harrigan v. Home Life Ins. Co. (Cal.), 61 Pac. Rep. 99.

[27] Mut. Life Ins. Co. v. Allen (U. S. S. C.), 20 Sup. Ct. Rep. 913.

[28] Mut. Life Ins. Co. v. Hill (U. S. S. C.), 20 Sup. Ct. Rep. 914.

of the non-payment of such premium, such facts show a sufficient excuse for not giving the notice required.[29]

Where, subsequent to the failure of the insured to make an annual payment of premium on a policy payable to his executors, administrators or assigns, and, subsequent to the lapsing of the policy for failure to make payment, he being fully informed and knowing that the policy had been, by the company, declared lapsed and void for non-payment of premium, the company, through its agents, applied to the insured to make restoration of the policy by making payment of the defaulted premium and having the policy restored to force, but he refused to make such payment and refused longer to continue the policy or make any further payments thereon, and then and there elected to have the same terminated; and the company, relying upon his election and determination, at all times subsequent thereto treated said policy as lapsed, abandoned and terminated, and relying upon such conduct of the insured abstained from taking any further action or step in relation to the policy, by way of notice or otherwise, in order to effect the cancellation and termination thereof — such facts show a sufficient excuse for not giving the notice required and show an abandonment and rescission of the contract, so that there could be no recovery on such policy, though no attempt was made to give the notice required by the statute.[30]

11. *As to Nature of Policies Affected.*—See second case under Division 7 hereof. The statutes apply to policies issued upon payment of semi annual premiums.[31]

The payment of each annual premium upon a policy to continue for the natural life of insured constitutes a renewal of the policy, within the meaning of the act of 1877 requiring notice to be given upon "renewal" of policies.[32]

The statutes are not applicable to policies issued upon the payment of monthly premiums, nor to term policies for a year or less.[33]

A policy providing for the payment of $100 "solely from the funds accumulated from payments of its insured," and that if such accumulation on hand shall be insufficient to pay accrued claims, an assessment shall be made on contracts in force of five per cent. on single premium, and if the whole fund from assessments and accumulations is insufficient to pay all claims, it shall be distributed *pro rata*, etc., of a life insurance corporation doing business in New York, issued upon business done in that State, is within the act of 1877, and, therefore, Laws N.Y. 1885, ch. 328, sec. 1, providing that the act of 1876, ch. 341 (of which the act of 1877 is an amendment), shall not apply to policies issued on weekly or monthly installments of premiums, if the application therefor waives the notice required by statute, does not excuse the company issuing such policy from giving the statutory notice.[34]

12. *As to Person Entitled to Notice.*—The beneficiary is not the person whose life is "assured," requiring the notice to be given to the beneficiary rather than to the person whose life is insured.[35] Notice otherwise sufficient is effective if mailed to the person whose life is insured, though the policy was issued to his wife and recited payment of the first premium by her.[36]

13. *As to Place of Contract Involving Applicability of Statute.*—Where a policy expressly makes New York the place of the contract, the statutes apply thereto, though the application was taken and the policy delivered in another State.[37]

A policy issued upon an application containing a declaration that the application is made subject to a New York company's charter and the laws of New York, and which application is also made a part of the policy issued upon it, is within the purview of the statutes, especially where the policy provides

[29] Mut. Life Ins. Co. v. Phinney (U. S. S. C.), 20 Sup. Ct. Rep. 906.

[30] Mutual Life Ins. Co. v. Sears (U. S. S. C.), 20 Sup. Ct. Rep. 912.

[31] Germania Life Ins. Co. v. Peetz (Texas C. C. A.), 47 S. W. Rep. 687.

[32] Carter v. Brooklyn Life Ins. Co., 110 N. Y. 157.

[33] Baldwin v. Provident Savings Life Assur. Soc., 48 N. Y. Sopp. 463, 23 App. Div. 5.

[34] Jacklin v. National Life Assn., 75 Hun, 595, 24 N. Y. Supp. 746.

[35] Osborne v. Home Life Ins. Co. (Cal.), 56 Pac. Rep. 616; Linn v. New York Life Ins. Co., 2 Mo. App. Rep. 201.

[36] Rowe v. Brooklyn Life Ins. Co., 42 N. Y. Supp. 646.

[37] Griesemer v. Mutual Life Ins. Co., 38 Pac. Rep. 1031, 10 Wash. 202.

that the premiums and the insurance are payable in New York and proof of death is to be made there.[38]

14. *As to Pleading and Practice in Applying the Statute.*—It is not necessary for either party to plead the statutes of a State in the United States courts, since those courts are bound to take notice judicially of all State statutes.[39] It is no departure in pleading, where plaintiff relies on the statute, under the practice in the United States courts, to plead performance of the conditions of the policy and depend on the statute, since the courts of the United States take judicial knowledge of the statutes of the several States.[40] It is not necessary for either party to plead the statutes of New York in an action on a policy in that State, since the courts take judicial knoweldge of the statutes of their respective States.[41] Where a valid contract of life insurance is admitted by the company to have existed under a policy in suit, but which the company claims has become void for non-payment of premiums thereon, it is necessary, if such policy be within the purview of the statutes, for the company to affirmatively answer both non payment of the premium and service of a notice in accordance with the statutory requirement, though the complaint allege a full performance of the contract.[42]

Where an answer in a United States court, is not demurred to, the fact that it pleads a notice which would be insufficient under the New York law to forfeit a policy, cannot avail to reverse a judgment, in a case tried by the court without a jury, which judgment is brought by writ of error to an appellate court for review, where the court found that notice was sent in accordance with the statute, since only the rulings of the court in the progress of the trial of the case and the sufficiency of the facts to support the judgment, can be reviewed. Caldwell, C. J., dissenting.[43]

15. *As to Power of Parties to Waive the Statute.*—The statutory provisions are not subject to be set aside or waived either by the company or the assured, or by both together, by policy provision or otherwise.[44]

16. *As to Presumption of Knowledge of Law of Place of Contract.*—When parties contract with reference to the law of a particular State, it is conclusively presumed that each knows the law of that State; and the mere expression of an opinion by one to the other as to their rights under such contract cannot amount to a fraud or deceit as to the other.[45]

17. *As to Service of Notice being Condition Precedent to Forfeiture.*—A policy is not, when within the purview of the statute, invalidated by failure to pay a premium when due by the terms of the policy, but such policy is only voided by a failure to pay within the time limited by the statute after the company has served the notice required. Andrew, Earl and Gray, JJ., dissenting.[46]

Life policies which are New York contracts are dominated by the statute as completely as though the statutory conditions had been explicitly incorporated in them, and the giving of the notice required by statute is made a condition precedent to the forfeiture of every

[38] Phinney v. Mutual Life Ins. Co., 67 Fed. Rep. 493; Equitable Life Assur. Soc. v. Nixon, 81 Fed. Rep. 796, 26 C. C. A. 620; Equitable Life Assur. Soc. v. Trimble, 83 Fed. Rep. 85, 27 C. C. A. 404; Mutual Life Ins. Co. v. Hill, 97 Fed. Rep. 263; Mutual Life Ins. Co. v. Allen, Cohen, Sears, 97 Fed. Rep, 985, 986; Hathaway v. Mutual Life Ins. Co., 99 Fed. Rep. 531; Mutual Life Ins. Co. v. Dingley, 100 Fed. Rep. 408; Griesemer v. Mutual Life Ins. Co., 38 Pac. Rep. 1031, 10 Wash. 211; Johnson v. New York Life Ins. Co., (Iowa), 78 N. W. Rep. 905; Equitable Life Assur. Soc. v. Frommhold, 75 Ill. App. 43.

[39] Mutual Life Ins. Co. v. Hill, 97 Fed. Rep. 263; Mutual Life Ins. Co. v. Allen, Cohen, Sears, 97 Fed. Rep. 985, 986; Hathaway v. Mutual Life Ins. Co., 99 Fed. Rep. 985; Mutual Life Ins. Co. v. Dingley, 100 Fed. Rep. 408.

[40] Mutual Life Ins. Co. v. Hill, 97 Fed. Rep. 263; Mutual Life Ins. Co. v. Dingley, 100 Fed. Rep. 408.

[41] Fisher v. Metropolitan Life Ins. Co., 56 N. Y. Supp. 260, 37 App. Div. 575.

[42] Fisher v. Metropolitan Life Ins. Co., 56 N. Y. Supp. 260, 37 App. Div. 575; Mullen v. Mutual Life Ins. Co., 89 Tex. 259, 34 S. W. Rep. 605.

[43] McMaster v. New York Life Ins. Co., 99 Fed Rep. 856.

[44] Equitable Life Assur. Soc. v. Nixon, 81 Fed. Rep. 796, 26 C. C. A. 620; Equitable Life Assur. Soc. v. Trimble, 83 Fed. Rep. 85, 27 C. C. A. 404; Mutual Life Ins. Co. v. Hill, 97 Fed. Rep. 263; Mutual Life Ins. Co. v. Dingley, 100 Fed. Rep. 408; Griffith v. New York Life Ins. Co., 101 Cal. 627, 36 Pac. Rep. 113; Osborne v. Home Life Ins. Co., 56 Pac. Rep. 616; Harrington (Harrigan) v. Home Life Ins. Co., 58 Pac. Rep. 180.

[45] Mutual Life Ins. Co. v. Phinney (U. S. S. C.), 20 Sup. Ct. Rep. 906.

[46] Baxter v. Brooklyn Life Ins. Co., 119 N. Y. 450.

policy, within the purview of the statute, after it has become a subsisting contract between the parties.[47]

18. *As to Sufficiency of Notice Under the Statute*—(a.) *Sufficient.*—A notice is sufficient, though it omits to name the amount of premium, the person to whom and the place where payable.[48]

Where every essential fact required to be known is intelligibly stated in the notice, it would be a most harsh and unwarrantable construction to hold that, because not literally following the words of the statute, such notice may be disregarded.[49] A notice issued in pursuance of the statute of 1877 to the holder of a term policy, requiring the payment of separate amounts for mortuary premium and expense charge, is sufficient if it gives to the assured such information as will remind him of when and where he is to make payments pursuant to the terms of the contract, their amount, and effect of non-payment.[50]

(*b.*) *Insufficient.*—A notice sent to an address known by the company not to be the address given by insured as the place where he desired his mail sent is insufficient.[51] A notice stating, as the amount of premium due, a less sum than named in the policy, is ineffectual to forfeit the policy, where the statute applies.[52] A notice given in pursuance of the statute, but omitting to state that unless the premium was paid within the time limited by the statute the policy would be forfeited, is ineffectual to avoid a policy for non-payment of premium.[53] A notice mailed in time, but stating only that "in accordance with your contract number 204,439 with this company, $47.70 will be due on the 28th day of August, 1892, payable to yours respectfully, William H. Lamberth, General Agent," does not comply with the statute, and a forfeiture of the policy cannot be predicated upon the non-payment of the premium stated.[54] A notice stating that "members neglecting to pay are carrying their own risk" is not equivalent to the statutory language that a policy "will be forfeited and void," and the use of the former clause instead of the latter invalidates the notice.[55] A notice given in an attempted compliance with the law of 1877, stating that the policy will "cease to be in force," is not a compliance with the statute, requiring the notice to state that the policy and all payments thereon will become forfeited and void, and is, therefore, insufficient.[56] Where a policy provides for one month's grace in payment of premiums, a notice which declares that the policy will be forfeited upon the first day the premium is due, without regard to the days of grace provided in the policy, is insufficient, and a forfeiture cannot be predicated on a failure to pay the premium stated.[57] A notice, required to be served at least 30 days prior to the day the premium falls due, but mailed November 2, notifying insured of premium due December 2, is one day too late.[57a]

19. *As to Tender of Unpaid Premiums.*—Tender of premiums is not necessary to keep a policy in force or to maintenance of an action thereon, where the company has failed to give the required notice.[58] Whether or not the tender of premiums unpaid is necessary before an action is maintainable on a policy kept in force by failure to give the notice required by the statute, such tender is excused where it appears that, if made, it would have been refused.[59]

20. *Conclusion.*—The recent decisions of the United States Supreme Court have been hailed by the companies interested as a relief from the burden imposed by these statutes.

[47] See authorities cited, *supra*, 16; De Frece v. New York Life Ins. Co., 136 N. Y. 144; Fiscner v. Metropolitan Life Ins. Co., 56 N. Y. Supp. 260, 37 App. Div. 575.

[48] Trimble v. New York Life Ins. Co. (Wash.), 55 Pac. Rep. 429.

[49] McDougal v. Provident Savings Life Assur. Soc., 135 N. Y. 551.

[50] McDougal v. Provident Savings Life Assur. Soc., 135 N. Y. 551.

[51] Carter v. Brooklyn Life Ins. Co., 110 N. Y. 157; Phelan v. Northwestern Mutual Life Ins. Co., 113 N. Y. 148.

[52] De Frece v. New York Life Ins. Co., 136 N. Y. 144.

[53] Elmer v. Mutual Benefit Life Assn., 19 N. Y. Supp. 289.

[54] Griesemer v. Mutual Life Ins. Co., 10 Wash. 202, 38 Pac. Rep. 1031.

[55] Phelan v. Northwestern Mutual Life Ins. Co., 113 N. Y. 148.

[56] Schad v. Security Mutual Life Assn., 42 N. Y. Supp. 314, 11 App. Div. 487.

[57] New York Life Ins. Co. v. Dingley, 93 Fed. Rep.

[57a] See cases, *supra*, 9.

153, 35 C. C. A. 245. *Contra:* Trimble v. New York Life Ins. Co. (Wash.), 55 Pac. Rep. 429.

[58] Mutual Life Ins. Co. v. Hill, 97 Fed. Rep. 263; Baxter v. Brooklyn Life Ins. Co., 119 N. Y. 450.

[59] Griesemer v. Mutual Life Ins. Co., 38 Pac. Rep. 1031, 10 Wash. 202.

It is obvious from a close reading of those decisions, bearing in mind the construction of the statutes adopted by the courts of New York and elsewhere, that the exultation of the companies is not well founded. The Supreme Court of the United States refused to pass upon the applicability of the statutes to business done by New York companies in other States, holding, simply, that where a company claims that it can prove a voluntary abandonment and rescission of the contract of insurance by all the parties interested therein, it should be afforded the opportunity of offering such proof, and that, if made, the statute can have no application in such cases to avoid the rescission, though the notice required thereby was not given, Whether the company will be able to prove the rescissions as alleged in those cases remain to be seen; at least the supreme court does not seem to have put a period even to the cases before it.

The most recent case by the appellate division of the Supreme Court of New York, (Schnell v. Mutual Life Ins. Co., *supra*), throws no new light on the subject, the contentions there on behalf of the plaintiff being clearly untenable.

It is certain that the companies interested and the courts will have much of this sort of litigation before them yet, and the chances for success are about evenly divided between the claimants and the companies, though more care will have to be exercised by the former in getting their cases into court, because of the determination of the companies to diminish to the smallest degree the effect of these laws and their recent apparent successes along that line, whetting them on to further effort.

ROBERT J. BRENNEN.

Indianapolis, Ind.

MASTER AND SERVANT — DISCHARGE OF SERVANT—MEASURE OF DAMAGES.

LOUISVILLE SOAP CO. v. VANCE.

Court of Appeals of Kentucky, November 14, 1900.

1. Where plaintiff, who was employed by defendant as a traveling salesman for an indefinite time, and was to receive both a salary and commissions, must have understood from the circumstances that defendant was acting on the idea that plaintiff's salary would not begin until he was sent out, plaintiff, by remaining silent, acquiesced in that construction of the contract.

2. The contract being for no definite term, defendant had the right, after sending plaintiff out, to recal him at pleasure, and did not, therefore, become liable to him for commissions he might have made but for his recall.

3. Defendant is liable to plaintiff for the reasonable value of the time he lost between the date of his recall and the time when he should, as a reasonable man, have understood that his services were dispensed with; the circumstances of his recall not being such as to show defendant's intention to terminate the contract.

HOBSON, J.: Appellee, J. C. Vance, brought this suit on July 20, 1898. He alleged in his petition that on or about August 1, 1897, appellant employed him to travel for it and sell soap; that it agreed to give him employment, and pay him $25 a month, together with his expenses, and a commission of 5 per cent. on all sales made by him; that by reason of the agreement of appellant to give him this employment he did not seek other employment, and held himself in readiness to perform and carry out his part of the agreement; that by reason of the negligence of appellant and its failure to make goods for sale, he was held out of work, but was promised from time to time to be sent out, until finally he was sent out for a period of three weeks, and then again put off, and held subject to appellant's orders, and prevented from obtaining other employment until July 12, 1898, when he was notified that his services would not be required; that he thereupon demanded pay for his time and the breach of the contract of employment, but appellant refused to pay him anything, and that by its failure to carry out the contract he had been prevented from earning money otherwise, and otherwise damaged to the amount of $1,200, for which he prayed judgment. He also alleged that while on the road he sold soap to the amount of $434.45, on which his commissions at 5 per cent. amounted to $21.72, and for this he also prayed judgment. Appellant, by its answer, traversed the material allegations of the petition. The jury to whom the cause was submitted returned a verdict for appellee in the sum of $525, on which the court below entered judgment. The material questions in the case relate to the sufficiency of the evidence to support the verdict, and the correctness of the instructions given the jury.

It will be observed that appellee did not allege that he was employed for a definite term, or seek damages for a discharge contrary to the contract. The gist of the action is that appellant, after employing him, failed to put him to work, and so kept him from earning money otherwise. A recovery is sought, not only of the $25 per month for the time he was idle, but also for what he might have earned as commissions under his contract. The question in the case to be first determined is, therefore, from what time is appellant responsible to appellee for his compensation under the contract?

Appellee was the only witness introduced on his own behalf. He testified that he saw a notice

in a newspaper that the appellant company had been incorporated, and, being out of employment, applied to it on July 24, 1897; that he talked with the president, told him that he had had considerable experience as a salesman, had traveled in Georgia, knew the trade there, and would like to represent the company in Georgia. The president answered that they expected to sell some goods in the South, and would want some man in that territory. He asked for appellee's references, which were furnished, and then said, "Well, you make out a sixty-day trip in Georgia, and along in the first part of August we will, in all probability, be ready for you." The next day appellee handed him the trip of 60 days he had made out, which was a list of towns in Georgia, taken alphabetically, apparently, from some book. At the conference on July 24th, the question of compensation came up. Appellee told the president that he was not an experienced soap man. The president said, "Well, I expect to pay your traveling expenses and a nominal salary and a commission." Appellee said, "What commission do you expect to pay?" He said, "We will pay five per cent. on all goods sold, and we will pay a nominal salary." Appellee asked, "What is that?" He answered, "Twenty-five dollars a month." Appellant wrote to the references furnished by appellee, and the answers were satisfactory, and he testified that he considered himself employed if his references were satisfactory. This is, in substance, all the testimony of appellee as to what occurred between him and the president at the time the alleged contract was made, so far as it relates to the terms of the contract. He had never seen the president of the company before, and the president knew nothing about him. The company was just starting, and had not got into operation. When it began operations, in August, the first soap maker failed to turn out a good article. Another was tried, who also failed; and then a third, who was a success, but he was not gotten until about the 1st of September, and to get him a drummer named Harris had to be employed. Appellee testifies that he did not consider at the time appellant to be indebted to him for salary in August or September, because things prevented his being sent out. The product of the factory during the fall was all sold by the drummers then out. That winter the plant was enlarged, and about May 1st appellant was sent out. He was recalled May 17th, and returned to Louisville May 23d. The next day he went to Jeffersonville on some business for appellant, but after that did nothing more for it. On his return, May 23d, he paid to appellant a balance of cash in his hands furnished him for expenses. Subsequently it paid him $1.66 commissions on three sales made by him. Although appellee was doing nothing from July 24th, when the contract was made, until May 1st of the next year, he at no time demanded any salary of appellant, although he time and again asked that he be sent out.

On appellee's own evidence, the court should have instructed the jury to find for him nothing up to the time that he was sent out. His testimony shows only that he was looking for employment, and that appellee expected to need his services, and agreed to send him out when it got ready. He admits himself that he did not expect salary for the months of August and September, and the fact that he demanded nothing, although he remained in the same situation for six months longer, is conclusive that he did not expect his pay to begin before he was sent out; for from the circumstances he could not but understand that appellant was acting on the idea that his salary would not begin until he was sent out, and by remaining silent he, at least, acquiesced in this construction of the contract. To permit him now to recover salary for this time would be to allow him to mislead appellant to its prejudice. Either party had the right to terminate the arrangement at any time. Appellee elected to wait, in the hope of getting a permanent job, out of which he would make money, and, having made his election, must abide by it.

The court also erred in instructing the jury that they might find for appellee such sum as it may be reasonably certain from the evidence he would have earned as commissions under the contract had he been given opportunity. There are numerous authorities holding that profits which might have been realized from appellee's commissions on orders taken by him are too uncertain to be recovered (see 8 Am. & Eng. Enc. Law [2d Ed.], p. 624; Sedg. Dam. [8th Ed.] sec. 671, and cases cited); though there is some conflict of authority on the subject. See Wakeman v. Manufacturing Co. (N. Y. App.), 4 N. E. Rep. 264, 54 Am. Rep. 675. But in this case it is unnecessary for us to determine which is the true rule. The contract sued on being for no definite term, appellant had the right, after sending appellee out, to recall him at pleasure, and he might at any time have left its service. It did not, therefore, become liable to him for any profits he might have made but for his recall; nor is it liable for any profits he might have made if sent out again, for it was under no obligation to send him out again. But when it recalled him it did not, according to his evidence, terminate his contract of service until July 12, 1898. If this is true, it is liable to him for the reasonable value of the time he lost between the date of his recall from Georgia and the time when he should, as a reasonable man, have understood that his services were dispensed with; the circumstances of his recall not being according to his testimony, such as to show an intention on the part of appellant to terminate the contract or to release him from its service.

Appellee is entitled to no compensation prior to May 1, 1898. He is entitled to his salary for the time he was employed after that date, and his commissions on the orders he took which were accepted, and a reasonable compensation

for the time which he lost after his recall before he was informed by appellant that his services were dispensed with. Appellant should be credited on these amounts by the sums paid him. Judgment reversed, and cause remanded for a new trial and further proceedings not inconsistent with this opinion.

NOTE.—*Recent Decisions on Subject of Damages for Wrongful Discharge of Servant.*—One under contract of employment for a certain time, who is discharged without cause, is entitled to recover wages which he might have earned under the contract. Leyenberger v. Rebanks, 55 Ill. App. 441. Where an action for breach of a contract of hiring for a stipulated time is brought, and a trial had, before the expiration of that time, damages may be assessed for the period subsequent to the trial. Cutter v. Gillette (Mass.), 39 N. E. Rep. 1010. In an action for wrongful discharge, an instruction fixing the measure of damages at the whole amount that would have been due plaintiff if he had continued to work for the defendant under the contract sued upon from the date of his discharge until the expiration of the contract, after allowing credit for anything which plaintiff may have earned from services rendered to others, and after allowing a further credit of an amount equal to what "he will be able to earn between now and" the expiration of the contract, is correct. Boland v. Glendale Quarry Co. (Mo. Sup.), 30 S. W. Rep. 151. Where a servant, whose wages are payable, under a contract, by installments, is dismissed without fault, he may consider the breach total, and sue for all damages up to the time of trial, but prospective damages beyond such time, being speculative, cannot be allowed. McMullen v. Dickinson Co. (Minn.), 62 N. W. Rep. 120. Where an employe, in settling with an employee for injuries, agrees to employ him at a specified salary for life, or during his ability and disposition to perform the duties required, and afterwards discharges him without cause, such employee may recover prospective damages. Brighton v. Lake Shore & M. S. Ry. Co. (Mich.), 61 N. W. Rep. 550. In an action by an employee for wrongful discharge, brought before the expiration of the term for which he was employed, it is proper to refuse an instruction that plaintiff's recovery must be limited to the amount which would have been due him at the commencement of the suit, less the amount he could have earned since his discharge. Wilkie v. Harrison, 166 Pa. St. 202, 30 Atl. Rep. 1125. In an action for the wrongful discharge of a servant, when the trial takes place before the expiration of the stipulated term of employment, plaintiff may recover damages only to the time of trial. Bassett v. French (Com. Pl. N. Y.), 31 N. Y. S. 667, 10 Misc. Rep. 672. Where a contract of employment provides that it may be terminated by the employer on one week's notice, the employee is entitled to only one week's salary as damages on refusal of the former to continue his employment. Derry v. Board of Education of City of East Saginaw (Mich.), 61 N. W. Rep. 61. In an action for wages, brought after an alleged wrongful discharge of plaintiff, but before the time for which he was employed had expired, he cannot recover for wages which accrued after the action was brought. Solomon v. Vallette (Super. Buff.) 30 N. Y. S. 193, 9 Misc. Rep. 389. A complaint in a suit to recover salary for the unexpired term on breach of a contract of employment need not aver that plaintiff sought, but failed to obtain, other employment after his discharge. Missouri, K. & T. Ry. Co. v. Faulkner (Tex. Civ. App.), 31 S. W. Rep. 543. Where a servant employed for a certain time is wrongfully discharged, he may recover the amount he would have received as wages after his discharge, to the end of the time for which he was employed, less the amount he earned, or might have earned, elsewhere. Fish v. Glass, 54 Ill. App. 655. A discharged servant is bound only to reasonable diligence in quest of other employment, and the cancellation of an engagement contracted after the discharge, if in good faith, because of sickness, is no breach of the obligation to defendant master. Bassett v. French (Com. Pl. N. Y.), 31 N. Y. S. 667, 10 Misc. Rep. 672. The facts that an employee discharged before the expiration of his term, was a member of a partnership, that after his discharge he participated in the conduct of the partnership business, and that the partnership made profits of a certain amount monthly, would not require the jury, in an action by the employee to recover damages, for the wrongful discharge, to deduct plaintiff's share of the amount of such partnership profits from the wages which he would have received, where it did not appear that such profits were derived from plaintiff's personal service. Kyle v. Pou, 96 Ga. 166, 23 S. E. Rep. 114. Where an employee, discharged before the expiration of his term of service, brings an action for the wrongful discharge, and the defense is that he received compensation in other employments during the unexpired portion of his time, the burden of showing that fact and the amount of the compensation is upon the defendant. World's Columbian Exposition v. Richards, 57 Ill. App. 601. Rev. St. ch. 13, par. 13, providing for attorney's fees where an employee successfully maintains a suit for wages, does not apply where the employee sues for damages for wrongful discharge. World's Columbian Exposition v. Thompson, 57 Ill. App. 606. A servant wrongfully discharged has his option to sue at once for his damages, or to wait till the expiration of his term of employment, and the damages recoverable are the amount of his wages, at the contract price, to the date of the trial, where that takes place before the expiration of the term, less whatever sum it is shown that he has earned, or might reasonably have earned, since his discharge. Hamilton v. Love (Ind. Sup.), 43 N. E. Rep. 873. The amount of wages agreed to be paid for the unexpired term is, on an illegal discharge, *prima facie*, the measure of damages. Hamilton v. Love (Ind. Sup.), 43 N. E. Rep. 873. A refusal to allow one to perform a stipulated service does not entitle him to recover the agreed price for full performance, but only such damages as be actually sustained by the refusal. William Tarr Co. v. Kimbrough (Ky.), 34 S. W. Rep. 528. In an action for wrongful discharge plaintiff is entitled to recover wages up to the time of the trial of the action only, and not to the time the contract of employment would have expired. Zender v. Seliger-Toothill Co. (Sup.), 39 N. Y. S. 346, 17 Misc. Rep. 126. In an action by a traveling salesman, who by his contract was to be paid a percentage on the amount of his sales, for breach of the contract, the measure of damages is the amount plaintiff could have made on his sales had he been permitted to complete his contract, and not the value of his monthly services as a salesman. Cranmer v. Kohn (S. Dak.), 64 N. W. Rep. 125. The measure of damages for the discharge of a servant in violation of the contract of employment, is the amount of wages the servant would have earned under the contract, less

such sums as he would or could have earned by reasonable diligence elsewhere. Efron v. Clayton (Tex. Civ. App.), 35 S. W. Rep. 424. In an action by an employee for wrongful discharge, the amount of wages for the remainder of the term of service under the contract is *prima facie*, the measure of damages; and the amount earned by plaintiff during such time, or that he might reasonably have earned, is matter of defense, in mitigation of damages. Babcock v. Appleton Mfg. Co. (Wis.), 67 N. W. Rep. 33. When suit is brought and trial is had before the expiration of the stipulated term of service to recover damages for a breach of contract by a wrongful discharge, the recovery cannot be for the whole amount thereof to the date of trial, less such sum as plaintiff has earned, or might with reasonable diligence have earned, from the time of discharge to the time of trial. Darst v. Mathieson Alkali Works (U. S. C. C.), 81 Fed. Rep. 284. Where defendant is wrongfully discharged, he can recover the difference between the contract price per month and what he was able to earn, plus what he had to pay for house rent, which was to be furnished him under the contract. Hessel v. Thompson, 65 Ill. App. 44. A charge that in estimating the damages, where the servant had obtained other work, the jury might consider the probability of retaining the new position until the time of the original contract had expired, was erroneous, as allowing speculative damages. Pape v. Lathrop (Ind. App.), 46 N. E. Rep. 154. The measure of damages for wrongful discharge, in case the trial takes place before the contract time has expired, is the amount of the wages, at the contract price, to the date of the trial, less any sum which the servant has earned, or might reasonably have earned, since his discharge. Pape v. Lathrop (Ind. App.), 46 N. E. Rep. 154. A teacher, employed for a year, who is discharged without cause before expiration of that time, when it is impossible for her to secure another position, is entitled to recover full compensation at the contract price for the remainder of the year. Worthington v. Oak & Highland Park Imp. Co. (Iowa), 69 N. W. Rep. 258. For the employer's breach of a contract of employment at a specified salary during a person's natural life or his ability to do the work, the measure of damages is the amount which the employee would have earned up to the time of the trial at the contract salary, and the present worth of what he would be able to earn in the future, so long as he would be able, in the ordinary course of events, to perform the service, less any sums which he would be able to earn in other employment by the exercise of reasonable diligence. Stearns v. Lake Shore & M. S. Ry. Co. (Mich.), 71 N. W. Rep. 148. Depreciation of stock of an insurance company purchased from it by one engaging as its agent cannot be considered in estimating the damages to be allowed the agent for a breach of the contract of agency. Ray v. Lewis (Minn.), 69 N. W. Rep. 1100. Where both parties to a contract of theatrical employment recognize a custom that such a contract may be arbitrarily terminated on two weeks' notice, the maximum damages recoverable by the player for the manager's breach is two weeks' salary at the contract rate. Briscoe v. Litt, 42 N. Y. S. 908, 19 Misc. Rep. 5. An instruction, in an action for breach of a contract of employment, that the measure of plaintiff's damages, if anything, was the amount which he was to receive during the term, less the amount paid, is erroneous, as withdrawing from the consideration of the jury any circumstance in reduction of damages. Heroy v. Fan De Siecle Co., 44 N. Y. S. 611, 16 App. Div. 171. In an action for wages brought after an alleged wrongful discharge, but before the contract time had expired, plaintiff may recover wages which accrued after the action was begun. Solomon v. Vallette, 152 N. Y. 147, 46 N. E. Rep. 324. A servant is not entitled to recover his expenses in seeking other employment, in an action for wrongful discharge, though his earnings in such other employment are charged in reduction of his damage. Tickler v. Andrae Mfg. Co. (Wis.), 70 N. W. Rep. 292. Where an employee is prevented by his employer from performing his contract, he is not bound, for the purpose of lessening the damages, to accept new employment from the same employer, where it is not offered under circumstances inconsistent with the condition that such employment would be a modification of the original contract. Chisholm v. Preferred Bankers' Life Assur. Co. (Mich.), 70 N. W. Rep. 415. In an action for the breach of a contract of hire, the contract price for the unexpired term is *prima facie* the measure of damages to which plaintiff is entitled. Hansard v. Menderson Clothing Co., 73 Mo. App. 584. Damages for a servant's wrongful discharge being unliquidated, it is error to charge that the servant's recovery is the amount of his wages, less a stated sum allowed for what he probably would have earned during the remainder of the term by seeking other employment. Sommer v. Conhaim, 54 N. Y. S. 146, 25 Misc. Rep. 166. Where a servant's contract of employment has not expired at the time of trial, the measure of damages for his wrongful discharge is his wages up to then, less the amount he could have earned by seeking other employment. Sommer v. Conhaim, 54 N. Y. S. 146, 25 Misc. Rep. 166. In estimating a servant's damages for wrongful discharge, the amount he probably could earn during the remainder of the term in some other employment must be taken into consideration. Rightmire v. Hirner, 188 Pa. St. 325, 43 W. N. C. 207, 41 Atl. Rep. 538. Where, in an action for wrongful discharge of a servant, whose compensation was to be a fixed sum if his sales reached a certain sum, and a percentage if less, the only issue was as to the amount of sales if he had been permitted to complete his term, it was proper to submit that issue to the jury, and tell them that, if they found his sales reached the required sum, his compensation would be the unpaid balance of the stipulated amount. Cranmer v. Kohn (S. Dak.), 76 N. W. Rep. 937. Where, in an action for a wrongful discharge from employment, there was evidence that plaintiff was of age, and that he worked for his father, after he was discharged, evidence that he received no compensation from his father is admissible. Gwinn v. King (Iowa), 77 N. W. Rep. 834.

WEEKLY DIGEST

1. ADVERSE POSSESSION—Evidence.—The word "hostile," when applied to the possession by an occupant of real estate holding adversely, is not to be construed as showing ill will, or that he is an enemy of the person holding the legal title, but is applied to an occupant who holds and is in possession as owner, and therefore holds such possession against all other

claimants of the land.—HOFFINE v. EWING, Neb., 84 N. W. Rep. 93.

2. APPEARANCE—Vacating Judgment.—By appearing in a case and invoking the powers of the court to set aside a judgment as having been irregularly obtained, jurisdiction is given to the court over the parties appearing as to all proceedings had in the case.—FISK v. THORP, Neb., 84 N. W. Rep. 79.

3. APPEAL—Assignment of Error—Decree by Stipulation.—Where parties stipulate that in a pending case a decree shall be rendered on filing of the certified copy of an interlocutory decree entered in another cause of the same character, and a decree is entered conformably with the stipulation, an assignment of error will not lie to it.—MCCAFFERTY v. CELLULOID CO., U. S. C. C. of App., Second Circuit, 104 Fed. Rep. 306.

4. ARBITRATION AND AWARD—Builder's Contract.—An assignment in a builder's contract that the price agreed on is to be paid in installments on certificates of the architects, as the work progresses, until the building is completed, and, in case the parties cannot agree on the value of any change made or to be made, the same shall be appraised by the architects, does not make such appraisement a condition precedent to suing thereon.—MUNK v. KANLER, Ind., 58 N. E. Rep. 543.

5. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Validity.—Where a trust deed directed the sale of the personalty conveyed, and distribution of the proceeds among certain creditors, failure to show the amounts owing to such creditors did not invalidate the deed; such omission going only to the sufficiency of the consideration which may be shown by PAROL.—SILSBY v. STRONG, Oreg., 62 Pac. Rep. 633.

6. ATTORNEY AND CLIENT—Lien—Trust Deed.—A deed of trust in which an attorney declared that he held certain property for purposes expressed in a judgment referred to, "and in no other way," and further specified that, on conveyance as the beneficiary should elect, he (the trustee) would pay over the proceeds of the sale of the property to the beneficiary, operated as a waiver of any lien claimed by the attorney on the property for services or disbursements in behalf of the beneficiary.—WEST v. BACON, N. Y., 58 N. E. Rep. 522.

7. ATTORNEY'S LIEN—Extent—Enforcement.—An attorney has a general or retaining lien upon all papers, books, documents, or money of his client coming into his hands in the course of his professional employment.—CONES v. BROOKS, Neb., 84 N. W. Rep. 85.

8. BANKRUPTCY—Appointment of Trustee.—It is the policy of the law and the courts to have the affairs of bankrupts administered by a trustee, who will have in view the interests of the creditors only, and not those of the bankrupts or their friends, and the election of a trustee should not be approved where it was accomplished by the vote of an attorney in fact holding proxies obtained from creditors through the solicitation of the bankrupts, and against the votes of a large majority of the other creditors.—FALTER v. REINHARD, U. S. D. C., S. D. (Ohio), 104 Fed. Rep. 292.

9. BANKRUPTCY — Competency of Witness — Wife of Bankrupt.—Rev. St. Mo. 1899, § 4656, which modifies the common-law disability of a married woman in the matter of testifying for or against her husband, and permits her to testify in certain specified actions, contains nothing which makes her testimony competent before a referee, in bankruptcy proceedings against her husband, in respect to property alleged to have been transferred to her in fraud of his creditors.—IN RE COHN, U. S. D. C., D. (Mo.), 104 Fed. Rep. 328.

10. BANKRUPTCY—Exemptions — California Statute.—Under Code Civ. Proc. Cal. § 690, subd. 6, which exempts from execution "two horses and one cart or wagon, by the use of which a cartman, drayman, teamster or other laborer habitually earns his living," a bankrupt whose occupation was that of a whitewasher, kalsominer, paper hanger, and repairer of plastering, and who owns a horse and wagon, which he uses exclusively for the purpose of conveying his supplies, tools, ladders, etc., from his residence to the places where he has jobs of work, and without which he could not carry on his occupation at a profit, is entitled to claim such horse and wagon as exempt.—IN RE HIKDMAN, U. S. C. C. of App., Ninth Circuit, 104 Fed. Rep. 331.

11. BANKRUPTCY — Exemptions — Effect of Waiver in Note.—Under Bankr. Act, 1898, § 70a, and its other provisions relating to exemptions, exempt property claimed by the bankrupt constitutes no part of the assets in bankruptcy, and no title thereto vests in the trustee; nor is the court given jurisdiction and control over such property, where the exemption is allowed by the laws of the State, by the fact that a creditor holds notes in which the bankrupt waived the benefit of the exemption laws.—IN RE BLACK, U. S. D. C., W. D. (Penn.), 104 Fed. Rep. 289.

12. BANKRUPTCY—Partnership—Firm and Individual Debts.—Where a partnership and its members have been adjudged bankrupts, individual notes of a partner, executed to a creditor of the firm, and credited on a note of the firm held by such creditor, constitute *prima facie* payments of so much of the firm indebtedness, and are provable against the separate estate of the partner who gave them.—IN RE STEVENS, U. S. D. C., D. (Vt.), 104 Fed. Rep. 328.

13. BANKRUPTCY—Provable Debts—Claim Arising After Filing of Petition.—The rights of the creditors of a bankrupt in general relate to the date of the filing of the petition. A debt not then in existence, although arising before the adjudication, cannot be proved against his estate, nor is it released by his discharge; and the trustee takes title under Bankr. Act, § 70, only to property or rights of property with which the bankrupt was so vested prior to the filing of the petition that he could transfer them.—IN RE BURKA, U. S. D. C., E. D. (Mo.), 104 Fed. Rep. 326.

14 BANKS—Occupation—Uniformity of Taxation.—2 Sayles' Civ. St. art. 5049, subd. 5, providing for the levy of an occupation tax on every person, firm, or association engaged in banking, is not void, under Const. art. 8, § 2, which requires all occupation taxes to be equal and uniform on the same class of subjects, by the fact that it cannot be enforced against national banks, although applying to banks doing similar business, since the act applies to all banks subject to State taxation.—BROOKS v. STATE, Tex., 58 S. W. Rep. 1032.

15. BILLS AND NOTES—Cancellation—Duress.—Where a wife, having mutilated a note given her by her husband, sued to reinstate and recover on the note on the ground that she had mutilated it under duress consisting of threats by her husband, and it appeared that he had stated to her that, if she did not mutilate the note, he would heap coals of fire on her head as long as she lived, threats made before and after the mutilation should be considered to determine whether his disposition towards her was such that she reasonably apprehended personal violence from the threat.—KESTER v. KESTER, Oreg., 62 Pac. Rep. 635.

16. CARRIERS — Passenger — Fare — Limitations on Ticket.—A railroad ticket, having thereon a special contract, signed by the person to whom such ticket was issued, stipulating that it shall be good for the passage of that person only, does not entitle any other person to transportation; nor has a purchaser from the original holder any right to act upon an assurance given by a ticket agent that the ticket will be accepted for such purchaser's passage, when it is in the contract further stipulated that no agent shall have authority to alter, modify, or waive in any particular the terms or conditions therein set forth.—COYLE v. SOUTHERN RY. CO., Ga., 37 S. E. Rep. 163.

17. COMPROMISE — What Constitutes. — A right of action for a tort is not extinguished by a "compromise settlement" in which a given sum is to be paid to the injured party, unless it be expressly agreed between the parties that the promise to pay the amount fixed

by the settlement shall be accepted as a satisfaction of the original claim.—FOUCHE v. MORRIS, Ga., 37 S. E. Rep. 182.

18. CONTRACTS—Conditional Acceptance.—Plaintiff offered to sell defendant a ranch on which plaintiff had cattle. Defendant wrote plaintiff that possession of the ranch and fixtures must be given at once, and the cattle removed therefrom by a certain date, to which plaintiff replied that he would thus give possession, but that he might be delayed five or ten days in moving the cattle. Held, that plaintiff's acceptance was not such an unconditional one as to constitute a sale.—NORTH TEXAS BLDG. CO. v. COLEMAN, Tex., 58 S. W. Rep. 1044.

19. CONTRACTS—Consideration—Parol Evidence.—Where a contract of a news company to furnish news to a newspaper for a fixed time, provided that the price should "not exceed $300 per week," parol evidence is not admissible to show the agreed consideration therefor in an action against the newspaper for refusing to take such news, since the contract is not ambiguous.—UNITED PRESS v. NEW YORK PRESS CO., N. Y., 58 N. E. Rep. 527.

20. CONTRACTS—Subsequent Agreement.—An agreement by a trustee under a trust deed for the security of debts to charge no commissions for selling the property and paying the debts therein provided for is sufficient consideration for a promise by a son of the grantor to repay the trustee any amount he might be compelled to pay on account of his suretyship for certain of the debts secured.—STACY v. ROSE, Tenn., 58 S. W. Rep. 1087.

21. CONTRACT—Sales Agent—Material Alteration.—A contract with a sales agent authorized sales by him in "the State of Indiana and ——," room being left blank for the description of other territory which the principal contemplated thereafter authorizing him to work; but the contract expressly provided that it contained "the full understanding," and was not to be affected by "any verbal statement whatever." Held, that the insertion in the blank of a description of additional territory was a material and unauthorized change of the contract, relieving from liability the agent's sureties, whose bond was indorsed on the contract as first executed.—GOOD ROADS MACHINERY CO. v. MOORE, Ind., 58 N. E. Rep. 540.

22. CORPORATION—Authority of Agent—Medical Aid to Employee.—The manager of a business corporation has no implied authority to furnish medical aid and assistance to a servant of the corporation who has been injured outside the line of his duties.—CHASE v. SWIFT & CO., Neb., 84 N. W. Rep. 86.

23. CORPORATIONS—Corporate Note—Execution.—Where the president and secretary of a corporation, without authority or knowledge of the board of directors, executed a note of the corporation to the president, on which a default judgment was subsequently rendered against the corporation after service on the president, the stockholders of the corporation were not estopped from attacking the validity of such judgment in an action against them by the assignee to enforce its payment out of unpaid subscriptions.—SAYLOR v. COMMONWEALTH INVEST. & BANK. CO., Oreg., 62 Pac. Rep. 652.

24. CRIMINAL EVIDENCE—Theft of Hogs.—Where the prosecuting witness in a trial for the theft of hogs testified that he procured certain meat from a place kept by another witness, but the meat was not identified as stolen property, and the defendant was not present when it was procured, what was done there was *res inter alois acta*, and inadmissible.—BALLOW v. STATE, Tex., 58 S. W. Rep. 1023.

25. CRIMINAL LAW—Assault With Intent to Murder.—In a prosecution for an assault with intent to murder, in which defendant claimed that the discharge of his pistol was accidental, a charge that if it was discharged by defendant, and the jury have a reasonable doubt as to whether it was discharged accidentally, they should acquit, is not open to the objection that it is not affirmative, and shifts the burden of proving such defense on the accused, to establish the same beyond a reasonable doubt.—ALVAREZ v. STATE, Tex., 58 S. W. Rep. 1013.

26. CRIMINAL LAW—Forgery—Allegation of Name of Person Forged.—An indictment for forgery which charged that defendant, without lawful authority, and with intent to injure and defraud, did unlawfully, willfully, and fraudulently make a false instrument in writing, "purporting to be the act of another," was not deficient in not alleging after the purport clause the name of the person forged.—RHUDY v. STATE, Tex., 58 S. W. Rep. 1007.

27. CRIMINAL LAW—Larceny—Ownership.—A person having the mere custody or temporary use of personal property, in the capacity of servant of the owner, and who could not maintain an action for trespass, as bailee, for injury to the same, is not properly designated as the owner in an information for larceny.—STATE v. BEATY, Kan., 62 Pac. Rep. 659.

28. CRIMINAL LAW—Larceny—Property Brought from Another State.—Where a party commits larceny in one State, and carries the stolen goods into another State, and there makes any removal or asportation of them with intent to steal the same, he may be properly tried and indicted for the larceny in the latter State.—STATE v. BOUTON, Nev., 62 Pac. Rep. 595.

29. CRIMINAL TRIAL—New Trial—Jury.—Under Code Cr. Proc. art. 817, subd. 7, providing that a defendant is entitled to a new trial where the jury, after retiring, receive other testimony, evidence that, while the jury were deliberating, one juryman told another, who was holding out for acquittal, that the defendant had served a term in the penitentiary, entitled defendant to a new trial, as such evidence, though not legal, was on a material issue, and calculated to influence the verdict.—YSAGUIRRE v. STATE, Tex., 58 S. W. Rep. 1005.

30. DEED—Affixing Revenue Stamp.—Where the omission to affix revenue stamps to a deed is promptly supplied, it will not invalidate the instrument when there is no fraudulent intent.—TAFT v. SIMPSON, Mich., 84 N. W. Rep. 77.

31. DEEDS—Construction—Estate Conveyed.—Under a conveyance to grantor's daughter "and the heirs of her body (meaning her own children), and, if none, then at her and their death to the next of kin," etc., the grantee takes only a life estate, capable of enlargement into fee-simple in the event of issue living at her death.—PETERSON v. FERRELL, N. Car., 37 S. E. Rep. 189.

32. DEED—Covenants—Incumbrances.—In a deed of conveyance a covenant against incumbrances is personal as between the grantor and grantee, but when such deed contains a stated consideration, and the covenantee conveys the premises to one having no notice of the real consideration, such grantee may, upon paying off the incumbrance, maintain an action for the damages sustained against the covenantor, and such action is not subject to set-off or defense by the covenantor.—RANDALL v. MACBETH, Minn., 84 N. W. Rep. 119.

33. DEED—Date of Delivery.—Where a deed is dated several months earlier than the date of acknowledgment, and the grantor testified that it was delivered about the date when it was acknowledged, it will be assumed, in the absence of other evidence, that it was delivered on the date of its acknowledgment.—WHITESIDE v. WATKINS, Tenn., 58 S. W. Rep. 1107.

34. ESTOPPEL—Equity.—Land belonging to defendant was sold under a trust deed, and the purchaser conveyed it to A, who, at the request of the defendant, advanced the amount of the debt, under an agreement that, if the defendant should pay the debt by a certain time, the land would be reconveyed to him. The defendant failed to make such payment. Held, that he could not plead as a defense to a suit by the grantor of A for the possession of the land, or to be subrogated to

the rights of A, that the conveyance from the original purchaser to A was defective.—GENTRY v. GAMBLIN, Miss., 28 South. Rep. 809.

35. EVIDENCE—Declarations.—When it is material to show the purpose or reason for the departure of a person, or of an act done by him, his declarations of his purpose or reason for so doing, made at or about the time he acts, if made in a natural way, and without any circumstances of suspicion, are admissible as original evidence.—MATTHEWS v. GREAT NORTHERN RY. CO., Minn., 84 N. W. Rep. 101.

36. EVIDENCE—Secondary Evidence.—Contents of an application to a life insurance company cannot be proven by the testimony of a local secretary of such organization, where it was not shown that he had ever seen or read the application, and no sworn or certified copy of the same was introduced, and no attempt made to procure one by deposition or otherwise.—PHILLIPS v. UNITED STATES BENEV. SOC. OF SAGINAW, Mich., 84 N. W. Rep. 57.

37. EXECUTION—Sale Under Void Writ.—Though only one of several executions under which a sale is made be valid, the officer has power to sell and convey.—SHEPHERD v. DELPH, Ky., 58 S. W. Rep. 991.

38. FEDERAL COURTS—Cancellation of Instruments.—A federal court of equity has jurisdiction of a suit for the cancellation of a forged note brought by the purported maker against the payee, who is alleged to be asserting the validity of such note and attempting to negotiate the same, where under the State statute an action to recover on said note will not be barred for more than 11 years; the complainant's remedy at law in such case by defending against the note when sued thereon not being as practical and efficient as that in equity, and therefore not adequate and complete, so as to exclude the jurisdiction of equity.—SCHMIDT v. WEST, U. S. C. C., D. (Ind.), 104 Fed. Rep. 272.

39. FEDERAL COURTS—Jurisdiction—Test of Conviction of Capital Crime.—The test which determines whether or not a case is one of conviction of a capital crime is not the penalty which is actually imposed, but it is that which may be imposed. If the crime may be punished with death, and there is a conviction, it is a case of a conviction of a capital crime.—GOOD SHOT v. UNITED STATES, U. S. C. C. of App., Eighth Circuit, 104 Fed. Rep. 258.

40. FEDERAL COURTS—Writ of Error in Case of Capital Crime.—A conviction for murder punishable with death is a conviction for a capital crime of which the supreme court, and not the circuit court of appeals, has jurisdiction on writ of error, although the jury have qualified the judgment by rendering a verdict "without capital punishment."—GOOD SHOT v. UNITED STATES, U. S. S. C., 21 Sup. Ct. Rep. 33.

41. FIXTURES—Trade Fixtures—Removal.—An owner of certain premises on which was a greenhouse mortgaged the premises, and afterwards conveyed an interest in the greenhouse to a firm to which she leased the ground occupied by it, at the expiration of which the firm was to have the privilege of removing the greenhouse and all appurtenances. The greenhouse and heating apparatus connecting therewith were temporary structures, which rested on the ground, and were removable without any damage to the estate. Held sufficient to show that such greenhouse and heating apparatus were mere trade fixtures, which the owner was entitled to remove as against the purchaser of the premises at a foreclosure of the mortgage.—ROYCE v. LATSHAW, Colo., 62 Pac. Rep. 627.

42. FRAUDS, STATUTE OF—Debt of Another—Oral Promise.—Under Civ. Code, § 1624, subd. 2, providing that a contract to answer for the debt of another is void unless the same, or some note or memorandum thereof, is in writing and signed by the party to be charged, an oral contract to pay for fruit purchased by another, in the event the latter failed to do so, was void.—TEVIS v. SAVAGE, Cal., 62 Pac. Rep. 611.

43. GUARDIAN—Parents—Appointment.—Under Code Civ. Proc., § 1751, requiring the court, in appointing guardians of minors, to appoint the father or mother, "if found competent," it will be presumed that a parent is competent, and hence where there is no evidence that the parent asking to be appointed is incompetent, the court has no discretionary power to appoint another, under Civ. Code, § 246, proving that the court is to be guided by what appears to be for the best interest of the child in making the appointment.—CAMPBELL v. WRIGHT, Cal., 62 Pac. Rep. 613.

44. HOMESTEAD—Loss of Family—Right of Life Tenan to Exemption.—After a debtor has acquired the right to the exemption of a homestead he does not lose the right by reason of the fact that his wife has died, and his children have grown up and left him, where he continues to live in the same house, though he boards with his tenants on the land.—SUTER v. QUARLES, Ky., 58 S. W. Rep. 990.

45. HUSBAND AND WIFE—Estate by Entirety.—The common-law rule of estate by entirety does not obtain in this jurisdiction.—KERNER v. MCDONALD, Neb., 84 N. W. Rep. 92.

46. INSURANCE—Pledge of Policy.—Where an insurance policy is payable to a creditor of insured as his interest may appear, otherwise to insured executor, and the creditor holds the policy as collateral, and has paid the premium thereon, he, in order to recover need not show any assignment of it to him, as he is the absolute owner.—ANDREWS v. UNION CENT. LIFE INS. CO., Tex., 58 S. W. Rep. 1038.

47. JUDGMENT—Execution—Unliquidated Demand.—Under Civ. Code Prac., § 439, providing that the plaintiff in an execution returned "No property found" may institute an equitable action "for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment," plaintiff may subject any claim of the debtor against another on which an action of *assumpsit* would lie at common law.—MERIWETHER v. BELL, Ky., 58 S. W. Rep. 987.

48. JUSTICE OF THE PEACE—De Facto Judge.—Where a person acting as police judge is at least a *de facto* officer, and is holding a *de facto* court, the decisions made and judgments rendered by him are not void, and his title to office is not subject to collateral attack.—IN RE CORUM, Kan., 62 Pac. Rep. 661.

49. JUDGMENT—Res Judicata.—Where the owner of an interest in a way sued to have a gate erected across the same by defendant declared a private nuisance, and asked the abatement thereof, and damages, and all other equitable relief, a judgment in favor of defendant in such action was a complete bar to a subsequent suit by plaintiff for the same relief, but brought on the ground that the way was a public or semi-public road, and seeking to have the gate removed as an obstruction, since the same issues were necessarily involved in both suits, and the same evidence would be required to sustain plaintiff's cause of action.—PHELAN v. QUINN, Cal., 62 Pac. Rep. 623.

50. LIBEL—Gravamen of Action—Declaration.—The gravamen of an action for libel is not the injury to the plaintiff's feelings, but damage to his reputation in the eyes of others, and a declaration is insufficient which fails to show that the alleged libelous article was understood by its readers to refer to the plaintiff.—DU VIVIER v. FRENCH, U. S. C. C. of App., Seventh Circuit 104 Fed. Rep. 278.

51. LIBEL—Pleading—Damages.—In an action for libel, plaintiff, in order to recover for damages in his profession, must, in his declaration, connect the libel by the proper colloquium with his profession, and allege special damages.—SMEDLEY v. SOULE, Mich., 84 N. W. Rep. 63.

52. LIFE TENANT—Purchase of Hostile Claims.—A life tenant cannot purchase hostile claims to set up in

opposition to the original title during his life tenancy.—HUNT v. RABITOAY, Mich., 84 N. W. Rep. 59.

53. MALICIOUS PROSECUTION—Evidence — Malice.—Citizens and city officers are justified in taking proceedings in the courts to test the validity of an ordinance, and are not subject to an action for malicious prosecution if they did not act maliciously or oppressively.—JAMES v. SWEET, Mich., 84 N. W. Rep. 61.

54. MANDAMUS — Issuance.—The statute authorizing the issuance of a peremptory *mandamus* without notice has reference to cases in which the refusal of a public officer to discharge an official duty is so obviously inexcusable, and the necessity for prompt action so imperative, that notice must be dispensed with in order to prevent a failure of justice.—HORTON v. STATE, Neb., 84 N. W. Rep. 87.

55. MASTER AND SERVANT—Fellow Servants.—Where plaintiff was employed in removing rock from the floor of defendant's tunnel, and a large stone was thrown in the tunnel by blasting, and the loose rock surrounding and supporting such stone formed the material on which plaintiff and others were engaged, and the act of one of such employees, who was tunnel boss, caused the large rock to fall on plaintiff, injuring him, it was not error to give judgment for defendant, since the tunnel boss, in such employment, was a fellow-servant, and was not representing defendant in providing a safe place to work.—ROSS v. UNION CEMENT & LIME CO., Ind., 58 N. E. Rep. 500.

56. MASTER AND SERVANT — Fellow-Servants.—The negligence complained of having been the order of the mine boss, who was plaintiff's fellow-servant, and the superintendent not having participated in the direction or control of the work in which plaintiff was engaged, the employer is not liable for the injury suffered.—VELAS v. PATTON COAL CO., Penn., 47 Atl. Rep. 860.

57. MASTER AND SERVANT — Fellow-servants — Assumption of Risk.—Where one accepts employment from a railroad company, involving his transportation from place to place, injury by the negligence of any employee connected with the transportation of trains over its road is within the risks ordinarily incident to the service undertaken.—BENIGNIA v. PENNSYLVANIA R. CO., Penn., 47 Atl. Rep. 839.

58. MASTER AND SERVANT—Injury to Servant—Assumed Risk.—An employee, a part of whose duty for more than two years had been to sweep and clean out the bottom of an elevator shaft several times a week, who was injured, while performing such duty, by the descent of the car upon him, must be held to have assumed the risk of such injury, where the danger was obvious, and no change had been made in the mode of operating the elevator during the time of his employment.—VOLK v. B. F. STURTEVANT CO., U. S. C. C. of App., First Circuit, 104 Fed. Rep. 276.

59. MASTER AND SERVANT — Injury of Servant—Obvious Danger.—Where the condition of the roof in a coal-mine entry was called to the attention of the superintendent, who did not regard it as dangerous, and dissuaded the employee who spoke of it from his apprehension, the owner cannot claim that the danger was so obvious that an employee who was injured by the falling of the roof either assumed the risk or was guilty of contributory negligence.—HARDER & HAFER COAL MIN. CO. OF SULLIVAN CO., IND., v. SCHMIDT, U. S. C. C. of App., Seventh Circuit, 104 Fed. Rep. 282.

60. MECHANIC'S LIEN — Description of Premises—Variance.—Where the building on which a mechanic's lien was filed was owned by defendant, and was built by the contractor named in the lien, and was the only one built by him for defendant, and defendant did not own any other lots than those described in the complaint, a decree giving plaintiff a lien for material furnished will not be reversed, on the ground that there was a variance between the description of the premises as filed with the register of deeds and in the complaint.—HANNAH & LAY MERCANTILE CO. v. HARTZELL, Mich., 84 N. W. Rep. 52.

61. MECHANICS' LIENS — Homestead — Intention of Owner.—Where the contract to build a house for plaintiff stated that it was the intention of plaintiff to occupy it as his home, and he soon after commenced preparation to so occupy it, parties who furnished material to the contractor are not entitled to mechanics' liens on the property, since they are charged with sufficient notice to put men of ordinary prudence on inquiry as to the intended use of the property as a homestead.—HALDEMAN v. MCDONALD, Tex., 58 S. W. Rep. 1040.

62. MORTGAGES—Absolute Deed — Written Defeasance.—Where L executed an absolute deed to plaintiff of certain real property, and at the same time, and as part of the same transaction, plaintiff executed to L a written defeasance providing that the property would be reconveyed on the payment of certain sums of money advanced and to be advanced to L, the legal title remained in L, since the deed and defeasance constituted a mortgage.—SECURITY SAV. & TRUST CO. v. LOEWENBERG, Oreg., 62 Pac. Rep. 647.

63. MORTGAGE—Acknowledgment — Validity — Curative Act.—Act March 11, 1891, validates prior informal acknowledgments, but provides that the act should not apply to any conveyance when brought into question in any action then pending in the State. Defendant claimed under foreclosure of a mortgage, the acknowledgment of which was defective. Subsequent to the recording of the mortgage, but prior to the passage of the curative act, attachments had been levied on the mortgaged lands. Held, in an action to quiet title by a claimant under execution sale in one of the attachment suits, that the validity of the mortgage was not in question in the attachment suits, so as to bring the mortgage within the exception of the curative act.—STEERS v. KINSEY, Ark., 58 S. W. Rep. 1050.

64. MORTGAGE—Parties — Foreclosure—Substitution.—In an action brought to recover upon a note and to foreclose a mortgage, the district court has power to substitute the real owner of the note and mortgage as plaintiff in place of the payee of the paper, in whose name the action had been brought by mistake, and who had transferred the paper before the action was brought.—SERVICE v. FARMINGTON SAV. BANK, Kan., 62 Pac. Rep. 670.

65. MUNICIPAL CORPORATIONS — Amusements — Restriction—Ordinance. — Under a statute giving to a city the right to regulate bowling alleys, an ordinance is unreasonable which forbids the maintenance of such alleys within the fire limits of a city of about 2,000 inhabitants, or within 100 yards of any residence or business house, where the only location possible under such ordinance is about 600 yards from the business portion of the town, and remote from any thoroughfare or public place; since such restriction is a virtual prohibition.—EX PARTE PATTERSON, Tex., 58 S. W. Rep. 1011.

66. MUNICIPAL CORPORATIONS — Appearance — Attorney.—An attorney of a municipal corporation, without authority therefor, cannot waive the issuance and service of summons, and enter the voluntary appearance of the defendant in an action.—CHICAGO, B. & Q. R. CO. v. HITCHCOCK COUNTY, Neb., 84 N. W. Rep. 97.

67. MUNICIPAL CORPORATIONS—Control of Streets—Permission to Lay Pipes Therein.—Const. 1831, art. 2, § 17, authorizing the legislature to create corporations, but reserving the power of revocation in the legislature, permits it to withdraw one or more of the privileges granted to a corporation without revoking its entire charter.—MAYOR, ETC. OF WILMINGTON, v. ADDICKS, Del., 47 Atl. Rep. 866.

68. MUNICIPAL CORPORATIONS—Electric Light—Poles — Restrictions. — Under Burns' Rev St. 1894, § 4303 (Horner's Rev. St. 1897, § 3106c), authorizing a city to

grant the right to erect electric lighting poles and wires in streets under such restrictions as the council might deem proper, the right of the council to impose restrictions on a franchise to erect poles and wires was not limited to the manner in which the poles and wires should be used, but authorized the council to retain the right to revoke the license at pleasure.—COVERDALE V. EDWARDS, Ind., 58 N. E. Rep. 495.

69. MUNICIPAL CORPORATIONS — Lighting Streets — Exclusive Privileges. — Powers granted cities and towns "to provide for the lighting of the streets of the city or town," and "to regulate, improve, alter, extend and open streets, lanes and avenues, and to cause encroachments and obstructions, decayed buildings and ruins to be removed," do not authorize a city to grant an exclusive privilege to use the streets, lanes, and alleys thereof for the purpose of laying gas pipes therein, or erecting poles, wires, and towers thereon, for supplying gas or electricity to the city, or its inhabitants, by corporations authorized to manufacture gas or eletricity.—CAPITAL CITY LIGHT & FUEL CO. V. CITY OF TALLAHASSEE, Fla., 28 South. Rep. 810.

70. MUNICIPAL CORPORATIONS—Negligence—Streets—Independent Contractors.—Where a city contracted for the improvement of a street which made necessary the lowering of a bridge thereon, though done by an independent contractor, it was chargeable with notice of the necessity for guards and lights, and notice of their absence was not necessary.—CITY OF INDIANAPOLIS V. MAROLD, Ind., 58 N. E. Rep. 512.

71. MUNICIPAL CORPORATIONS—Street Improvements—Assessment for Benefit.—Where a resolution for improvement of a city street declared an intention to assess the cost on the abutting property in proportion to the frontage, but the action was taken under a law regulating such proceedings, which gave aggrieved owners a right to be heard, and to have irregularities corrected in the proceeding itself, an abutting owner cannot enjoin such improvement on the ground that the assessment on her property will be levied without reference to the actual benefits, since a resort to equity cannot be had where the remedy at law is adequate.—TAYLOR V. CITY OF CRAWFORDSVILLE, Ind., 58 N. E. Rep. 491.

72. MUNICIPAL CORPORATIONS—Torts of Police Officers.—A policeman, though appointed by the mayor and aldermen of a city, is a State officer, and not an officer of the city, for whose torts such city is liable, in the absence of a statute imposing liability.—MCILHENNEY V. CITY OF WILMINGTON, N. Car., 37 S. E. Rep. 187.

73. NEGLIGENCE — Railroads — Pleading.— Where a complaint for injuries received by plaintiff's being struck by defendant's train at a crossing avers that by reason of defendant's negligence, and without any fault or negligence on plaintiff's part, the locomotive struck plaintiff's team while crossing the track, the complaint was not objectionable for failure to allege plaintiff's freedom from contributory negligence.—CLEVELAND, C., C. & ST. L. RY. CO. V. GRIFFIN, Ind., 58 N. E. Rep. 503.

74. OFFICE AND OFFICERS—School Treasurer—Liability on Official Bond.—A county treasurer, having funds in his hands belonging to plaintiff school district, delivered a bank check therefor to the school district treasurer upon a bank which was at the time engaged in the usual and ordinary banking business. The school district treasurer accepted the check, presented it to the bank for deposit to his own credit, and received credit therefor on the books of the bank. Held equivalent to the delivery and receipt of the money by and from the county treasurer.—BOARD OF EDUCATION OF PRESTON INDEPENDENT SCHOOL DIST. NO. 45 V. ROBINSON, Minn., 84 N. W. Rep. 105.

75. PARTY WALLS—Permission to build.—Where plaintiff agreed that defendant might erect a party wall on the division line between their respective lots, such agreement, in the absence of anything to the contrary, implied that the wall should be solid and without windows, and defendant had no right to place windows in the second story thereof.—EVERLY V. DRISKILL, Tex., 58 S. W. Rep. 1046.

76. PLEDGE—Loss of Property—Liability of Pledgee.—Where personal property is pledged as security for a loan, it is the duty of the pledgee to exercise ordinary care in protecting it from theft; and the burden is upon such pledgee to show such care, to relieve himself from responsibility where it is stolen from him, in an action by the owner for its conversion.—WARE V. SQUYER, Minn., 84 N. W. Rep. 126.

77. PLEDGES—Sale of Collateral Note.—Where a note is pledged as collateral to another note, with authority to sell it at public sale, without notice on nonpayment of the principal note, an assignee of the principal note and the collateral cannot sell the latter four years after maturity of the principal note, and after several payments had been made thereon, without demand for payment on the maker of the principal note.—MOSES V. GRAINGER, Tenn., 58 S. W. Rep. 1067.

78. RAILROAD COMPANY—Accident at Crossing—Contributory Negligence.—A pedestrian passing over a street at a city railway crossing is not relieved from the use of any of his faculties to discover danger, and it is his duty, if he is unable to hear warning signals, to use his eyesight, if that sense would disclose such danger, and a failure to do so must be held to display want of ordinary care on his part. — SCHNEIDER V. NORTHERN PAC. RY. CO., Minn., 84 N. W. Rep. 124.

79. RAILROAD COMPANY — Children — Imputed Negligence.—The fact that a child 4 years old is permitted to go on a street in which street cars are operated is not such negligence on the part of the persons in charge of the child as will prevent a recovery for injuries received through the negligent operation of a car.—ELWOOD ELECTRIC ST. RY. CO. V. ROSS, Ind., 58 N. E. Rep. 535.

80. RAILROAD COMPANY—Railroad Employees—Damages for Injuries—Relief Department.—An employee of a railroad company, who has accepted from it damages for injuries cannot recover benefits for such injuries from the relief department of such corporation under an agreement of membership releasing the company from liability in case of such acceptance.—CLINTON V. CHICAGO, B. & Q. R. CO., Neb., 84 N. W. Rep. 90.

81. RAILROAD COMPANY — Sowing Grass on Right of Way—Damages.—Where defendant railroad planted Bermuda grass on its right of way for the preservation of its embankment, it is not liable to an adjacent owner for injuries to his land caused by the spreading of the grass thereto, in the absence of a showing of negligence on the part of defendant, or that it was an unjustifiable use of its property, since it does not become absolutely liable for the mere spreading of the grass.—GULF, ETC. RY. CO. V. OAKES, Tex., 58 S. W. Rep. 999.

82. RAILROAD COMPANY — Street Railroads—Removal of Obstructions.—A street railway, authorized by the proper township authorities to lay tracks and to erect trolley poles and string wires, is by implication authorized to remove obstructions, including shade trees, without compensation to the owner, when such removal is necessary for the construction of the railway as located by the township authorities.—MILLER V. DETROIT, ETC. RY. CO., Mich., 84 N. W. Rep. 49.

83. SALES—Contracts—Place of Making.—Defendants doing business in one State, made a contract at their place of business with plaintiffs, who were manufacturers in another State, by which defendants were to have the exclusive sale of plaintiff's goods on a certain street. Some goods were ordered, at the time the contract was made, and others ordered by mail, and paid for by acceptances on delivery, as agreed. Held, that the contract was made in defendant's State.—ROME FURNITURE & LUMBER CO. V. WALLING, Tenn., 58 S. W. Rep. 1094.

84. SALES — Delivery of Goods.—A delivery of goods described in a contract of sale to one of the vendees in

the name of both as previously directed by the other, who was absent at the time of delivery, was a sufficient delivery to both.—BLUMENTHAL v. GREENBERG, Cal., 62 Pac. Rep. 599.

85. TAXATION—Licenses—City Ordinance — Delivery of Goods by Agent.—An agent of a portrait company who receives pictures and frames in an unfinished state, shipped by his firm in another State to itself, breaks the bulk, and places the pictures in their proper frames, and delivers them to persons who previously contracted for them with other employees, is within a city ordinance declaring that persons engaged in the business of selling or delivering picture frames or pictures in such city, whether an order shall have been previously taken or not, shall pay a certain license tax.—STATE v. CALDWELL, N. Car., 37 S. E. Rep. 138.

86. TENANTS IN COMMON — Adverse Possession.—Adverse possession of land by one tenant in common under deed for more than seven years will inure to the benefit of all, unless he claimed to hold exclusively for himself, and will exclude any constructive possession in another claiming the legal title to the land. —WOODRUFF v. ROYSDEN, Tenn., 58 S. W. Rep. 1066.

87. TENANTS IN COMMON — Mutual Deeds — Implied Easement.—Where tenants in common of two city lots, on which were three houses (the middle house a cheap structure, standing one-half on each lot), by warranty deeds of even date conveyed one of the lots to one of the tenants and the other to another of the tenants, without reservation of any easement, no easement will arise by implication for the benefit of the owner of either half of the middle house against the owner of the other half, either for support or access, or for the use of water or sewer pipes.—WHYTE v. BUILDERS' LEAGUE OF NEW YORK, N. Y., 58 N. E. Rep. 517.

88. TRESPASS—Cutting Trees—Measure of Damages.—In an action for wrongfully cutting trees from plaintiff's land, the measure of damages is not confined to the market value of the wood cut, but damages to the land from the unauthorized cutting may be recovered. —DISBROW v. WESTCHESTER HARDWOOD CO., N. Y., 58 N. E. Rep. 519.

89. TRUST—Rights of Beneficiary. —"A conveyance in trust for a woman, married or single, of full age and sound mind, with no remainder to protect, and nothing prescribed for the trustee to do, operates to pass the legal title immediately into the beneficiary; the conveyance being made since the passage of the Act of 1866, which secures to women all their property as separate estate. The trust is executed."—CITY OF ROME v. SHROPSHIRE, Ga., 37 S. E. Rep. 168.

90. TRUST AND TRUSTEES — Negligence — Liability of Trustees Under Will.—Trustees under a testator's will, having the absolute legal title to certain property, are not liable as such for injuries to passers-by caused by the negligence of servants in repairing a sidewalk contiguous to the property, since the law will not allow trust property to be impaired by the trustee's negligence.—PARMENTER v. BARSTOW, R. I., 47 Atl. Rep. 365.

91. VENDOR AND PURCHASER — Assumption of Mortgage—Liability of Grantor.—Where J executed a trust deed on certain lots to plaintiff to secure certain notes, and then conveyed the lots to his wife, who did not assume payment of the mortgage, and she conveyed them to defendant, who agreed in his deed to pay such mortgage, plaintiff was entitled to maintain an action at law against defendant to recover a deficiency of the mortgage debt.—COBB v. FISHER, Colo., 62 Pac. Rep. 625.

92. VENDOR AND PURCHASER — Improvements—Right to Compensation.—Where a vendee has entered and placed valuable improvements on land under a parol contract to convey, and the vendor repudiates the contract and refuses to convey, the vendee or his personal representative may maintain an action to recover compensation for such improvements, and the right to such compensation exists, though the vendor has obtained possession.—LUTON v. BADHAM, N. Car., 37 S. E. Rep. 113.

93. VENDOR AND PURCHASER — Lien for Purchase Money.—Though property purchased by husband and wife was paid for in part with property of the wife, under an agreement that she should have an interest to that extent in the land purchased, she has no equity as against the vendor's lien for the unpaid part of the purchase money, the entire land having been conveyed to the husband.—MITCHELL v. BISHOP, Ky., 58 S. W. Rep. 989.

94. VENDOR AND PURCHASER—Rental Value of Land. —Where a vendor of property seeks to recover it from the vendee, who purchased it under an oral contract, and the vendee has erected valuable improvements on the property, it is error to submit an issue as to the rental value of the land, in determining the value of the use as an offset against the value of the improvements, without an explanation that the value of the land without the improvements was that to be determined.—PASS v. BROOKS, N. Car., 37 S. E. Rep. 151.

95. VENDOR AND PURCHASER—Sale of Land—Optional Contract.—An optional agreement to sell and convey land, signed by the owner alone, although unilateral at its inception, becomes absolute, and mutually binding upon both parties, if the option is accepted by the vendee within the time and on the terms specified; and such an agreement will be specifically enforced if it is fairly made, and for a sufficient consideration.— CHADSEY v. CONDLEY, Kan., 62 Pac. Rep. 663.

96. WILLS — Construction— Evidence. — Where the meaning of a will which discriminates against a child can be gathered from the instrument itself, evidence of declarations made by the testator showing his feelings towards such child is properly excluded; but where its meaning is in doubt the state of his feelings is a legitimate fact to be considered in solving the doubt, and such testimony should be received. — HURST v. VON DE VELD, Mo., 58 S. W. Rep. 1056.

97. WILLS—Mental Capacity—Insane Delusion.—On the issue of testatrix's mental capacity, an instruction that an insane delusion is the pertinacious belief of the existence of something which does not exist, and the acting on the belief; that belief of things which were entirely without foundation, and which no sane person would believe, was an insane delusion— was erroneous as confusing a mistaken belief with an insane delusion, and omitting to state that such delusion is created without and adhered to against reason or evidence.—IN RE KENDRICK'S ESTATE. Cal., 62 Pac. Rep. 606.

98. WILLS—Renunciation by Widow—Estoppel.—The widow of a testator, by notifying the appraisers of the estate that she claimed only the personal property given her by the will, did not estop herself from thereafter renouncing the provisions of the will within the twelve months allowed by the statute, and from claiming her rights of dower and distributable interest in the estate.—BROWN'S EXR. v. BROWN, Ky., 58 S. W. Rep. 993.

99. WITNESS—Impeachment — Cross-Examination.— The acts and conduct of a witness relative to the matters in controversy which are inconsistent with his testimony, likewise his motives, interest, or *animus*, as connected with the cause or with the parties thereto, may be proved for the purpose of weakening the force of his testimony; and for the same purpose it is proper to admit evidence of statements made by the witness relative to matters material to the issues contradictory of his testimony on the trial. As to all of these matters, if the witness denies or fails to admit the imputed act, conduct, motive, interest, *animus*, or contradictory statement, when interrogated about them on cross-examination, he may be contradicted by other testimony proving them.—STEWART v. STATE, Fla., 28 South. Rep. 815.